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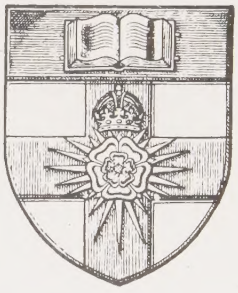

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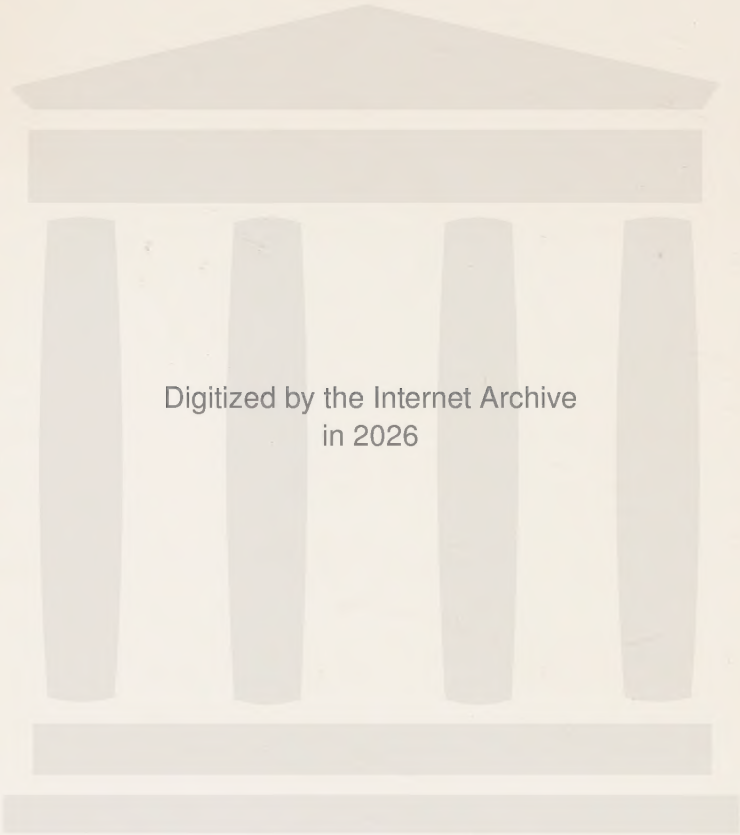

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THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED

DECEMBER 20, 1943, TO JULY 9, 1945

EDITED BY

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW, RECORDER OF NEWARK

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BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE STABLE AND MR. JUSTICE CASSELS.

PHILIP JACOBS.
HENRY SIMON CARR.
WILLIAM LONGTON FAIRHURST.

1944.
29 *February*,
13 *March*.

Conspiracy — Agreement to do Unlawful Act — Sale of Price-Regulated Goods at Excess Price—Proof of Knowledge of Illegality of Price Unnecessary—Prices of Goods Act, 1939 (2 & 3 *Geo.* 6, *c.* 118), *s.* 1—*Goods and Services* (*Price Control*) *Act*, 1941 (4 & 5 *Geo.* 6, *c.* 31), *s.* 1—*Price-Controlled Goods* (*Restriction of Re-Sale*) (*No.* 2) *Order*, 1942 (*S. R. & O.*, 1942, *No.* 958).

The three appellants were charged with conspiracy to contravene the provisions of the Prices of Goods Act, 1939, by selling price-regulated goods in the course of a business at a price in excess of the permitted price, and of conspiracy to contravene the Goods and Services (Price Control) Act, 1941 and the Price-Controlled Goods (Restrictions of Re-Sale) (No. 2) Order, 1942, by re-selling price-controlled goods in contravention thereof. All three appellants had agreed to accept the offer of a person who posed as a manufacturer's agent to buy various price-controlled articles at prices greatly in excess of the controlled prices and the goods were in fact bought, paid for and delivered. The Judge directed the jury : " If you are satisfied that they were engaged in the sale and forwarding it and bringing it about, it is not necessary that you should find, in order that they should be guilty of the crime charged, that they knew exactly what the right price was or that the price in question was the wrong one. . . . The offence is to sell at the wrong price, and in so far as they all agreed to do that, or any of them agreed to that, they are guilty of that with which they are charged by the prosecution ".

Held, that the direction was correct in law, as the common law misdemeanour of conspiracy consists in an agreement between two or more persons to do an unlawful act, and

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the unlawful act alleged to be the subject of the agreement was the selling of price-regulated goods at a price which was in fact in excess of the permitted price.

Appeals against conviction.

The appellants were convicted at Liverpool Assizes on November 13, 1943, before Wrottesley, J., of conspiracy to contravene the provisions of the Prices of Goods Act, 1939, by selling price-regulated goods in the course of a business at a price in excess of the permitted price, and of conspiracy to contravene the Goods and Services (Price Control) Act, 1941, and the Price-Controlled Goods (Restriction of Re-Sale) (No. 2) Order, 1942, by re-selling price-controlled goods in contravention thereof. Jacobs and Carr were each ordered to pay one half of the costs of the prosecution; Fairhurst was bound over for two years.

The appellants Jacobs and Carr were directors of Carris, Ltd., a company owning several chemist's shops in Liverpool. The appellant, Fairhurst, at the material time was a buyer employed by the company. In May, 1943, Fairhurst was approached by one Mulholland, who posed as a manufacturer's agent, to buy various price-controlled articles at prices greatly in excess of the controlled prices. All three appellants agreed to accept the offer and the goods were in fact bought, paid for and delivered. The goods included over 300 gross of razor blades at 42s. per gross, the controlled price being 15s. per gross. It was submitted on behalf of the appellants that they could not be convicted unless they knew that the price which they were paying was above the controlled price. Wrottesley, J., directed the jury: "If you are satisfied that they were engaged in the sale and forwarding it and bringing it about, it is not necessary that you should find, in order that they should be guilty of the crime charged, that they knew exactly what the right price was or that the price in question was the wrong one. It is not necessary that every member of the conspiracy should know that. The offence is to sell at the wrong price, and in so far as they all

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agreed to do that, or any of them agreed to that, they are guilty of that with which they are charged by the prosecution."

John Flowers, K.C., and *A. E. Baucher*, for the appellants Jacobs and Carr:

There was no evidence of *mens rea* on the part of the appellants. It is not suggested that they knew that the price which they were paying was in excess of the permitted price. The Prices of Goods Act, 1939, recognises two classes of buyers, innocent and guilty, and the appellants fall within the category of innocent buyers. Under section 10 (1) and (2) in such a case as the present a buyer has certain civil remedies with regard to the goods purchased, unless he is himself an aider and abettor of the offence: sub-section (5). The appellants have been acquitted of being aiders and abettors, and it is to be noted that section 10 does not deprive buyers who have innocently violated the law of civil remedies, and it is a fair inference that persons in that position cannot be guilty of a criminal conspiracy with the vendor, even though the vendor may be liable under the Act irrespective of whether he knew what was the proper price or not. On the argument of the Crown any person purchasing one of these blades would be guilty of conspiracy.

Neville Laski, K.C., and *A. E. Baucher*, for the appellant Fairhurst.

J. C. Jolly, K.C., and *R. H. Blundell*, for the Crown:

The object of section 10 was to enable a buyer who has been led into buying at an excessive price through the wrongful act of the vendor to recover the excess paid; it has no reference to the crime of conspiracy to do an unlawful act, namely to buy price-controlled goods at a price in excess of the permitted price. On the substantive charge under section 1 of the Act the prosecution are not obliged to prove *mens rea*, and it is not necessary to prove *mens rea* on a charge of conspiracy to commit the substantive offence. The prosecution need only prove an agreement to do the act which

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is forbidden. The defence here is, in substance, ignorance of law, but, as dealers in these goods, the defendants should have made themselves acquainted with the regulations governing prices.

Cur. adv. vult.

March 13.—The following judgment was read by:

HUMPHREYS, J.: This is an appeal on questions of law by three persons who were convicted at Liverpool Assizes of conspiracy. The grounds of appeal allege that the trial Judge misdirected the jury as to the essential matters to be proved and that there was no case proper to be left to a jury.

The facts are simple and were not in dispute. The appellants Jacobs and Carr are directors of Carris, Ltd., a company owning several chemist's shops in Liverpool. The appellant Fairhurst at the material time was employed as buyer to the company. In May, 1943, Fairhurst was approached by a man named Mulholland, posing as a manufacturer's agent, to buy various price-controlled articles at prices greatly in excess of the controlled price. All three appellants agreed to accept the offer and the goods were in fact bought, paid for, and delivered. The goods so bought included over 300 gross of razor blades at 42s. per gross, the controlled price of those goods at that date being 15s. per gross. An inspector of the Board of Trade learned of the transaction and a prosecution of the four persons concerned was decided upon and instituted by the Director of Public Prosecutions.

It was not disputed that the transaction involved Mulholland in a breach of section 1 of the Prices of Goods Act, 1939, which reads as follows: "It shall be unlawful for any person to sell, agree to sell or offer to sell, any price-regulated goods in the course of any business at a price which exceeds the permitted price, that is to say the basic price together with the amount of any permitted increase"; nor was it disputed that Mulholland was guilty of an offence against the Price-Controlled Goods (Restrictions of Re-sale) (No. 2) Order, 1942, in that he resold otherwise than by retail price-controlled goods bought by him in his business, not being

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goods bought from an importer or manufacturer. That order is designed to limit the number of middlemen in transactions in price-controlled goods, and his knowledge of it no doubt explains Mulholland's statement to the appellants that he was a manufacturer's agent, which was untrue.

The indictment contained eight counts, of which four only are material to this appeal. Count 6 charged Mulholland with the offence created by section 1 of the 1939 Act and the three appellants with aiding and abetting in that unlawful sale. Count 7 charged Mulholland with the offence of re-selling otherwise than by retail contrary to the Order of 1942, and similarly charged the appellants with aiding and abetting. To both those counts Mulholland pleaded guilty. The appellants pleaded not guilty to the whole indictment. Count 1 charged all four persons with a conspiracy to contravene the provisions of the Prices of Goods Act, 1939, by selling price-regulated goods in the course of a business at a price in excess of the permitted price. Count 2 charged a similar conspiracy to contravene the above-mentioned Order of 1942 and the Goods and Services (Price Control) Act, 1941, under which the Order was made, by re-selling price-controlled goods in contravention thereof. To these counts all four persons pleaded not guilty.

At the close of the case for the prosecution, a submission was made that the accused persons could not be convicted upon counts 1 or 6 unless it was proved that they knew that the price they were paying was above the permitted price. As to count 6, the appellants relied almost entirely upon the language of section 10 (5) of the 1939 Act. The side-note of that section reads as follows: "Right of buyer to avoid prohibited transaction, or to recover excess price", and the section is solely concerned with the civil rights of parties who have been parties to a transaction which is an offence against section 1 of the Act. Sub-section 1 of that section is as follows: "Where a prosecution has been instituted in respect of a sale of, or an agreement or offer to sell, any price-regulated goods in the course of any business at a particular

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price, and the person charged has been found guilty, then—(a) if the prosecution was in respect of a sale or agreement, the buyer under that sale or agreement . . . shall have the following rights, exercisable, subject as hereinafter provided, at his option ". It then goes on to provide that he shall have the right to treat the sale as avoided and to recover from the seller as money received by him for the use of the buyer any amount paid by the buyer as consideration. Then it deals with the rights of third parties. By sub-section (3) the buyer " shall have the right to affirm the sale or agreement, but to recover . . . to the extent of any loss sustained by him by reason of the contravention . . ." Then follows sub-section (5): " The rights conferred by this section shall not be exercisable by a person who is himself liable to punishment by reason of his having aided, abetted, counselled or procured, the contravention in question." It was submitted that the sub-section must be read as indicating that there are two classes of buyers, those who buy without aiding and abetting, and those who buy by aiding and abetting, the latter being those who knew and the former those who did not know the controlled price of goods, the buyers in the former category only beng awarded the rights conferred by the section.

Wrottesley, J., accepted that contention as to count 6 and withdrew that count from the jury, and apparently by general agreement count 7 shared the same fate. As to counts 1 and 2, the learned Judge declined to stop the case, and in summing up the case to the jury he directed them as follows: " I must remind you that the prosecution in this case do not set out to prove that these men knew what the price was or ought to have been; they do not set out to prove that. All they set out to prove is that in fact a sale at what I will call a wrong price took place and that these four men were all in it, were all engaged in it and knew of it. If that is so, if you are satisfied that they were engaged in the sale and forwarding it and bringing it about, it is not necessary that you should find, in order that they should be guilty of this crime charged, that they knew exactly what the right price was or that the

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price in question was the wrong one. It is not necessary that every member of the conspiracy should know that. The offence is to sell at the wrong price, and in so far as they all agreed to do that, or any of them agreed to do that, they are guilty of that with which they are charged by the prosecution."

The jury having convicted all the accused persons on counts 1 and 2, we have been invited to hold that that direction was wrong. Reliance was again placed upon section 10 and also upon section 15. Section 15 is as follows: "The illegality by virtue of this Act of any transaction shall not prejudice any rights acquired by any person other than a person who is guilty of a contravention of this Act in respect of the transaction, or who is liable to punishment by reason of his having aided, abetted, counselled or procured, such a contravention." That section appears to be directed to the rights of third parties and does not really carry the matter any further. Counsel for the appellants also relied strongly upon the ruling of the learned Judge as to the law of aiding and abetting. As to the correctness of that ruling this Court is not called upon to express an opinion. We desire, however, to guard ourselves against being supposed to assent to the proposition that a person who aids and abets another in the commission of an offence not involving any *mens rea* in the principal cannot be convicted in the absence of proof of *mens rea* on his own part. In our judgment, however, any difficulty which may be created by the language of section 10 can have no relevance to the consideration of the offence charged in count 1 of this indictment. That count does not charge any offence against this or any other statute, nor does it even involve the proposition that any such offence has been committed. It charges a common law misdemeanour, the accepted definition of which for centuries before 1832 was "an agreement between two or more persons to do an unlawful act", sometimes expressed as "an agreement for accomplishing an unlawful end". The antithesis introduced by Lord Denman in JONES' CASE (4 B. & Ad. 345, at p. 349).

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decided in that year, "or a lawful act by unlawful means", was not intended to alter the definition of criminal conspiracy and in any event does not assist the present appellants.

The unlawful act alleged to be the subject of the agreement in this case is the selling of price-regulated goods at a price in excess of the permitted price. There can be no question that the appellants did agree with Mulholland that they should buy and he should sell razor blades at 42s. a gross. What then is the answer? It appears to be that they did not know the terms of the Orders regulating the prices of the goods in which they dealt. But *ignorantia juris neminem excusat*. Mr. Flowers for Jacobs and Carr insisted that his clients were innocent buyers. It would, we think, be more accurate to describe them as buyers ignorant of the matters which it was their bounden duty to know and about which the slightest inquiry would have resulted in their enlightenment. In our judgment, the common law was correctly interpreted by the learned Judge in his direction to the jury.

Mr. Laski, for Fairhurst, felt himself unable to argue to the contrary, but submitted that the language of this statute indicated an intention to override the common law. It is no doubt true that Parliament can do anything, but the Court finds nothing in this statute indicating any such revolutionary tendency. The conviction on count 1 is upheld. Both learned counsel stated that they drew no distinction between counts 1 and 2, and any further discussion as to count 2 would be merely academic since the only penalty imposed was an order that Jacobs and Carr should each pay half the costs of the prosecution, which have not been increased by the insertion of count 2. The conviction, therefore, on that count also will stand, but we think it right to say that if count 2 had stood alone we should have required further argument as to the proof of the illegality of the agreement. The appeals are dismissed.

Appeals dismissed.

Solicitors: S. B. Levin, Liverpool, for appellants Jacobs and Carr; Ernest B. Kendall & Rigby, Liverpool, for appellant Fairhurst.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS, MR. JUSTICE SINGLETON, MR. JUSTICE TUCKER AND MR. JUSTICE CASSELS.

JAMES TURNER.

1944.
20 *March*,
3 *April*.

Evidence—Character of Prisoner—Imputation on Character of Prosecutrix — Rape — Defence of Consent — Questions and Evidence Directed to Proof of Consent—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*) (*ii*).

By the Criminal Evidence Act, 1898, s. 1 (*f*): "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution".

Where a prisoner charged with rape puts forward the defence that the prosecutrix consented to the act, he does not make an imputation on her character within the meaning of the above section so as to render himself liable to cross-examination on previous convictions or bad character. Further, questions and evidence which are directed to the proof of consent do not cause him to lose the benefit of the opening words of the section or render such cross-examination admissible.

SHEEHAN (1908), 21 Cox 561, followed.

Appeal against conviction and sentence.

The appellant was convicted at Bedfordshire Assizes on January 13, 1944, of rape and was sentenced by Charles, J., to four years' penal servitude.

The defence at the trial was that of consent. During the cross-examination of the prosecutrix the following occurred. (Q.) There is one point I must put to you, because they are my instructions. He took out his penis at some stage of the proceedings? (A.) Yes. (Q.) You were aware of that, were not you? (A.) Yes. I did not see him take it out. (Q.) You

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JAMES TURNER.

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knew he was seeking intercourse with you? (A.) Naturally, when he was struggling like that at my clothes. (Q.) Did you offer to relieve him in another way? (A.) Not in any shape or form. (By the Judge.) What does that mean, Mr. Davidson? Do you suggest that she offered to commit a gross indecency? (Mr. Davidson.) It amounts to an offer to masturbate. The appellant gave evidence himself to the same effect, and said that the prosecutrix took hold of his penis and said "I will do it". Charles, J., ruled that the above questions and evidence were an imputation on the character of the prosecutrix within the meaning of section 1 (*f*) (ii) of the Criminal Evidence Act, 1898, and that counsel for the Crown was entitled to cross-examine the appellant on previous convictions. Counsel for the Crown then elicited the fact that the appellant had been previously convicted of assault on a female with intent to ravish and sentenced to nine months' imprisonment.

On March 6 the appeal came on for hearing before a Court consisting of Humphreys, J., Stable, J., and Cassels, J., but was adjourned for argument before a full Court.

John Davidson, for the appellant:

A defence of consent in a charge of rape does not deprive the accused person of the protection of proviso (*f*). [He referred to SHEEHAN (1908), 21 Cox 561; BIGGIN, 14 Cr. App. R. 87; [1920] 1 K. B. 213, at p. 217; DONOVAN (1934), 25 Cr. App. R. 1, at p. 3.]

Section 1 (*f*) (ii) of the Criminal Evidence Act, 1898, is not to be construed as meaning that anything which may be said or done by the defence that involves an imputation on the character of the prosecutor or of the witnesses for the prosecution necessarily deprives the accused of the protection of proviso (*f*). It has been held that to say of a witness for the prosecution that he is lying is not within the second exception to the proviso: ROUSE, [1904] 1 K. B. 184. Further, the Court has a discretion in the matter: MAXWELL *v.* D. P. P.,

24 Cr. App. R. 152, at pp. 173–4; [1935] A. C., 309, at pp. 318—321.

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It is submitted that the principle to be followed is that if matters raised by the defence involve imputations on the character of the prosecutor or of the witnesses for the prosecution the accused does not lose the protection of proviso (*f*) if these matters are part of the *res gestae* or are immediately relevant to the issue before the Court. On the same principle, it has been held that the rule in RUSSELL *v.* RUSSELL, [1924] A. C. 687, which is absolute and of universal application, cannot be applied in a criminal case so as to prejudice an accused person in his defence: CARMICHAEL, 27 Cr. App. R. 183; [1940] 1 K. B. 630.

This construction of the statute accords with the decisions in most of the reported cases that deal with the point. [He referred to PRESTON, 2 Cr. App. R. 24; [1909] 1 K. B. 574; BRIDGWATER, [1905] 1 K. B. 131; DUNKLEY, 19 Cr. App. R. 78; [1927] 1 K. B. 323; HUDSON, 7 Cr. App. R. 256; [1912] 2 K. B. 465.] The relevant facts in HUDSON are fully reported only in the Criminal Appeal Reports, and some of these facts are to be found only in the arguments of counsel in that report. The *dicta* in that case are *obiter* and were not followed in EIDENOW (1932), 23 Cr. App. R. 145. MARSHALL (1899), 63 J. P. 36, may be an exception to the principle suggested, but the decision of the Court in that case has been doubted in DUNKLEY (*supra*).

T. R. Fitzwalter Butler, for the Crown:

In view of the decision of Jelf, J., in SHEEHAN (*supra*) and *obiter dicta* of Avory, J., in BIGGIN (*supra*) and of Lord Hewart, C.J., in DONOVAN (*supra*), it must be conceded that the mere putting forward of the defence of consent was not an imputation on the character of the prosecutrix within section 1 (*f*) (ii) of the Criminal Evidence Act, 1898. The point was expressly left open in PRESTON (*supra*), but the whole trend of judicial opinion since that date has been in the direction indicated. Moreover, this would logically appear to be the right view. On a charge of rape, the burden of

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proving absence of consent lies on the prosecution, and in raising the defence of consent the prisoner is merely contending that the prosecution have not proved one of the essential ingredients of the offence. The imputation in the present case, however, went very much further than the mere defence of consent. The suggestion was specifically made that the prosecutrix had herself incited the commission of another indecent act, and had acted in furtherance of that suggestion. As was pointed out in HUDSON (*supra*), the authority of which has never been questioned, and was expressly affirmed in POLLINGER (1930), 22 Cr. App. R. 75, the section must be construed strictly and one must not read into it words such as " unjustifiably " or " to a greater extent than is necessary for developing the defence ". The test whether the imputation is no more than a logical development of the defence, or is confined to matters relied on for proof of the defence, has never been authoritatively accepted. The decided cases in which imputations have been held to come within the words of the section are, it must be conceded, quite different from the present case. They are cases where the imputation consisted of the allegation that a Crown witness had committed the crime charged or some other crime; or had given false evidence for some specific motive such as revenge or ill-will; or had manufactured false evidence [he referred to ROBERTS (1920), 15 Cr. App. R. 65; WESTFALL (1912), 7 Cr. App. R. 176, and JONES (1923), 17 Cr. App. R. 117]; or was a person with a notorious reputation for lack of veracity: RAPPOLT (1911), 6 Cr. App. R. 156. One is driven back, therefore, to the construction of the actual words of the section, which are plain and unqualified. If the Court should hold that the cross-examination was inadmissible, it is submitted that this is a case where the Court might properly apply the proviso, as the evidence, especially that of the injured state of the prosecutrix directly after she had left the appellant, was overwhelming, and even if this cross-examination had never taken place, no reasonable jury could have failed to convict. [He referred to HADDY, 29 Cr. App. R. 182; [1944] 1 K. B. 442.] There is no

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direct authority for the application of the proviso in a case where cross-examination on previous convictions has been wrongly admitted, and it is right to point out that in MORRISSEY (1932), 23 Cr. App. R. 188, the mischief occasioned was said to be "incurable"; but in the later case of TOMASSO (1934), 25 Cr. App. R. 14, the possibility of there being a case where the Court would apply the proviso even after irregular cross-examination of this kind was at least envisaged.

Cur. adv. vult.

At the conclusion of the arguments the Court announced that the conviction would be quashed, and the reasons for the decision given at a later date.

April 3.—The following judgment was read by:

HUMPHREYS, J.: James Turner was convicted at the Bedfordshire Assizes of the rape of Ivy Muriel King. He appealed to this Court on a point of law, the ground as stated being that the learned Judge wrongly admitted evidence of the appellant's previous conviction. Such evidence was in fact admitted by the trial Judge, Charles, J., under the terms of section 1 of the Criminal Evidence Act, 1898, the material parts of sub-section (*f*) of which read as follows: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution".

The appeal came on for hearing on March 6 before a Court consisting of Humphreys, J., Stable, J., and Cassels, J., when the Court was invited by counsel for the Crown, Mr. Fitzwalter Butler, to give an authoritative ruling on a question expressly left open for future consideration in PRESTON, 2 Cr. App. R.

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24; [1909] 1 K. B. 568, namely, where a person charged with rape puts forward the defence that the woman consented to the act, is the nature or conduct of the defence such as to involve imputations on her character within the meaning of section 1 (*f*) (ii) so as to render admissible cross-examination of the accused as to previous convictions? The Court accordingly adjourned the hearing of the appeal and admitted the appellant to bail, and the Lord Chief Justice convened a Court of five Judges consisting of himself with Humphreys, J., Singleton, J., Tucker, J., and Cassels, J., to hear the appeal. The appeal was argued on March 20, when the Lord Chief Justice announced the decision of the Court that the appeal was allowed and the conviction quashed. We now proceed to give our reasons for that decision.

The details of the evidence are of little importance upon this question, but as the facts of the case must be stated for the purpose of a further question which in our opinion arises, they may be now shortly summarised. Ivy Muriel King was a woman who had been married and divorced by her husband. She lived and worked in Middlesex, but was on October 12 last on a visit to her mother who lived at Tempsford. At about 10.30 on that evening she parted from a friend with whom she had been for a walk, and then met three or four soldiers of whom the appellant was one. She was then on the main road to Dunstable and within 150 yards of her mother's house. The other soldiers walked on while the appellant remained talking to her. According to her evidence the appellant then caught hold of her, kissed her, tripped her up, hit her in the face when she struggled and tore open the zip fastening of the slacks she was wearing so as to tear the material. He then tore her knickers and succeeded in committing rape upon her. She then went straight to her mother's house. Her evidence was amply corroborated by other witnesses, including her mother and a witness named Orr, a lodger at her mother's house, both of whom described her as being in a distressed condition with a bruised forehead and cut lip, her clothes stained with mud, her trousers torn and

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her knickers showing through the tear, the knickers also being torn. She complained of being assaulted by a soldier, and Mr. Orr at once went out and found the appellant about 200 yards away. He denied all knowledge of the affair, but Mr. Orr insisted on getting from him his name and official number. The police were informed and the appellant was seen two days later at the camp, when he at once admitted being the man who had been with Miss King on October 12, and admitted having had connection with her but alleged that after she had protested against his putting his hand inside her trousers and after what he described as a bit of a struggle she had given way to him and allowed him to do what he wanted. He added: "I apologised for putting her on the road after we got up. It has worried me since and I am very sorry it has happened".

At the trial the defence put forward was that Miss King consented to the act, and Mr. Davidson, counsel for the appellant, cross-examined her as follows, at p. 15 of the transcript, letter H: "There is one point that I must put to you, because they are my instructions. He took out his penis at some stage of the proceedings? (A.) Yes. (Q.) You were aware of that, were not you? (A.) Yes. I did not see him take it out. (Q.) You knew he was seeking intercourse with you? (A.) Naturally, when he was struggling like that at my clothes. (Q.) Did you offer to relieve him in another way? (A.) Not in any shape or form." Then the learned Judge said: "What does that mean, Mr. Davidson? Do you suggest that she offered to commit a gross indecency?" and Mr. Davidson replied: "It amounts to an offer to masturbate". The appellant subsequently gave evidence on his own behalf, and at p. 28, in examination-in-chief, this took place: "(Mr. Davidson) Did she struggle a bit? (A.) Slightly. (Mr. Justice Charles): Why do you say she struggled? (A.) I don't know. After putting my hand there I unfastened my trousers and took out my penis, but she said: 'Don't do it; I can', and she put down her hand and took hold of it. She took hold of my penis and said: 'I will do it'. That made

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me worse. Then I went to put my penis to hers and found it awkward, so I laid her down on the ground near the wall. (Q.) You just laid her down? (A.) I just gently laid her down. (Q.) You gently what? (A.) I just bent her backwards and laid her down. (Mr. Davidson): Then what happened? (A.) I asked her if I could have connection. (Q.) You asked her, did you? (A.) Yes. (Q.) What did she say? (A.) She said: 'All right, but promise me you will be careful' ". The appellant was then cross-examined, and at what appeared to be the close of his cross-examination this took place: " (Mr. Justice Charles): There remains now another matter. The jury are asked to believe that the lady not only asked him to do something indecent, but that she took his person in her hand, that is to say, committed an act of gross indecency upon him, indecently assaulted him. (Mr. Butler): Yes, my Lord. If the cross-examination had stopped at that point, I should not have objected. (Mr. Justice Charles) But it did not. I do not think you can leave it there. The suggestion to the jury was that this woman is a filthy, nasty woman, utterly filthy, who would commit an indecent assault upon that man. I do not think that can be done without the consequence of such a suggestion being incurred ". After some further argument, the learned Judge, addressing the jury, explained the ruling which he was about to give, and he said: " In the ordinary way you cannot put a previous conviction to a man. The jury does not know anything against his character unless he makes an attack upon the character of the prosecutor, prosecutrix or one of the witnesses for the prosecution. Here he has done that and accordingly I rule that counsel for the prosecution is entitled to put any question as to his character ". The learned counsel for the Crown then asked this question: " This is not the first time an allegation has been made against you? (A.) No. (Q.) At the Anglesey Quarter Sessions in June, 1941, you were convicted of an offence of this kind? (A.) Yes. (Q.) You were convicted of an assault upon a female with intent to ravish her and sentenced to nine months' imprison-

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ment? (A.) Yes". The summing up of the learned Judge certainly did nothing to detract from the serious nature of that evidence which was left to the jury as part of the evidence in the case.

In these circumstances, it appears to us that two questions arise, the first being that referred to earlier in this judgment, and in the event of that question being answered in the negative the further question "did the appellant go beyond his allegation of consent by Miss King and make imputations on her character so as to render his cross-examination to character admissible by virtue of the sub-section?"

On the first question, it must be conceded that to allege of a woman that she permitted a man other than her husband to have intercourse with her would be regarded by most persons as an imputation upon her character. In the same way in former times one of the deadliest insults which could be offered to a gentleman was to call him a liar, and such conduct has often led to a duel with fatal results, but if an accused person refers to a witness for the prosecution as a liar, it does not follow that he is making an imputation on his character so as to render himself liable to cross-examination to character (see ROUSE, [1904] 1 K. B. 184). We think that wider considerations are involved in the solution of this problem. On a charge of rape the Crown has to prove two things, intercourse and the non-consent of the woman. For centuries the law has jealously guarded the right of an accused person to put forward at his trial any defence open to him on the indictment without running the risk of his character, if a bad one, being disclosed to the jury. It would be strange indeed if the Act of Parliament which allowed him, in most cases for the first time, to give evidence on oath had virtually deprived him of that right in the case of one serious felony by enacting that he could only do so at the risk of having his character exposed. What is commonly referred to as the defence of consent in rape is in truth nothing more than a denial by the accused that the prosecution has established one of the two essential ingredients of the charge. It is and must be the prosecution which intro-

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duces the question of consent or non-consent. Can the Legislature have intended to penalise the accused who avails himself of the right to give evidence conferred by statute by enacting that he may be cross-examined as to previous convictions if he denies one, though not if he only denies the other, of the two ingredients of the crime? In our opinion this is one of the cases where the Court is justified in holding that some limitation must be put on the words of the section, since to decide otherwise would be to do grave injustice never intended by Parliament. In SHEEHAN (1908), 21 Cox 561, the question came before Jelf, J., at the Stafford Assizes in March, 1908. That learned Judge held that where a prisoner in order to clear himself upon a charge to which consent is a good defence in law alleges that the prosecutrix did so consent, such allegation does not expose him to cross-examination as to previous convictions by reason of section 1 (*f*) of the Criminal Evidence Act, and he declined to follow a ruling to the contrary by Day, J., in FISHER (The Times, January 31, 1899).

We agree with that ruling of Jelf, J., and accordingly answer the first question in the negative. In so holding we are satisfied that we are following the uniform practice of the last thirty-five years. We know of no authority in which doubt has been cast upon the correctness of Jelf, J.'s decision. On the other hand, in BIGGIN (14 Cr. App. R. 87; [1920] 1 K. B. 213), in which the judgment of the Court turned upon another point, Avory, J., in the course of the argument, is reported at [1920] 1 K. B. 217 as observing: "In a prosecution for rape the prisoner cannot be cross-examined as to his antecedents and character merely because questions have been put to the woman alleging that she consented". Again, in DONOVAN (1934), 25 Cr. App. R. 1, at p. 3, Lord Hewart, C.J., observed during the argument: "I thought it had been held over and over again that putting forward a defence of consent does not amount to making an imputation on the character of the prosecutor." Mr. McClure for the Crown replied: "That is the accepted view of the law, though

there is a decision to the contrary in FISHER (*supra*)." Finally, it would seem that Charles, J., in the present case would not have permitted the cross-examination of Turner as to his previous conviction but for the introduction of the incident referred to in the cross-examination of Miss King at p. 16.

Turning to the second point, there can be no doubt that an accused person the nature of whose defence does not of itself involve imputation upon anyone may yet, in the conduct of that defence, make imputations which will bring him within the terms of section 1 (*f*) (ii). Where, however, as in the present case, the suggested further imputation is upon the character of the woman whose consent would afford a defence to the charge, the accused does not lose the protection of the opening words of (*f*) so long as his questions and evidence are directed to the proof of that consent. It may not always be easy to decide whether the new topic is so closely connected with the defence of consent as in effect to form part of it. For that reason we agree with the observation to be found in various judgments of the Court that the proper course for counsel for the Crown is that followed by Mr. Butler in the present case, namely, to obtain the ruling of the Court before embarking upon such a cross-examination. The presiding Judge, Recorder or Chairman of Quarter Sessions will no doubt remember that any mattter of doubt is to be resolved in favour of the accused. If the jury are inclined to believe the woman, they are not likely to be swayed by one more allegation against her made by the accused, whereas the effect of the proof of a previous conviction for a similar offence may, and in most cases probably will, be fatal to any chance of an acquittal. In the present case, we cannot find that the evidence given by the appellant which caused the learned Judge to allow the cross-examination to character went one step beyond the defence of consent. That evidence, in our view, did no more than state the details or particulars of the woman's conduct which, according to the witness's version of the facts, showed that the act of connection was not against her will or without her consent.

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On the whole we have come to the conclusion that the conviction cannot stand. We were invited by counsel for the Crown to apply the proviso to section 4 of the Criminal Appeal Act, 1907, on the ground that no miscarriage of justice has actually occurred. The case against the appellant certainly appears to have been a very strong one, but this is a case of a wrong decision on a question of law, as to the effect of which see the considered judgment of this Court in COHEN AND BATEMAN (1909), 2 Cr. App. R., 197, at p. 207. Indeed, we are not aware of any precedent for applying the proviso in a case where cross-examination to character has been deliberately admitted by the trial Judge. We have not had the advantage of seeing and hearing the witnesses and we feel that, without the evidence which was in our opinion wrongly admitted, the whole trial and the summing-up would have been of so different a character that we could not, without substituting ourselves for the jury, hold that the only reasonable verdict would have been one of guilty.

Conviction quashed.

Solicitors: Lathom & Son, Luton, for the Crown.

BEFORE
THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE ATKINSON.

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Prevention of Crime—"Found in Any Place"—Actual Apprehension on Premises not Necessary—"About to Commit an Offence"—Evidence Required—"Offence"—Character of Prisoner—Alternative Charges Available—Practice to be Followed.

By section 7 of the Prevention of Crimes Act, 1871: "Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration

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of the sentence passed on him for the last of such crimes be guilty of an offence against this Act . . . Thirdly. If he is found in any place, whether public or private, under such circumstances as to satisfy the Court before whom he is brought that he was about to commit . . . any offence punishable on indictment or summary conviction ".

The word " found " in the third paragraph to the above section is not equivalent to " arrested ", and accordingly actual apprehension of the offender on the premises is not necessary to constitute the offence.

MORAN *v.* JONES (1911), 75 J. P. 411, followed.

In order to constitute the offence there must be positive evidence that the accused person was then and there about to commit an offence, and evidence showing that he had it in mind to commit an offence if opportunity should arise will not suffice.

By section 20 : " The expression ' crime ' means . . . any felony [or certain named misdemeanours] . . . The expression ' offence ' means any act or omission which is not a crime as defined by this Act, and is punishable on indictment or summary conviction."

An indictment which charges the accused person with being found in a place under such circumstances as to satisfy the Court that he was about to commit an offence punishable on indictment, namely, larceny is not bad on the face of it, as the expression " offences " must be interpreted as including a " crime " as defined by the section as well as any act or omission which is not a crime as so defined, but is punishable on indictment or summary conviction.

Where the facts of a case are such that the prisoner may equally be charged with two offences, one of which involves proof to the jury that he is of bad character, and the other requires no such proof, the latter should always be selected as the charge to be made.

Appeal against conviction and sentence.

The appellant was convicted at the County of London Sessions on February 1, 1944, of being found in a place in such circumstances as to satisfy the Court that he was about to commit an offence, contrary to section 7 of the Prevention of Crimes Act, 1871, and was sentenced by the Deputy-Chairman to twelve months' imprisonment with hard labour.

The indictment alleged that the appellant had been convicted at the Central Criminal Court of a crime in 1940, that he had

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been previously convicted of a crime, and that within seven years immediately after the expiration of the sentence passed on him for the last crime, namely, on December 2, 1943, he was found in certain public or private places, to wit, Portsea Hall and Clifton Court, in the county of London, in such circumstances as to satisfy the Court before which he was brought that he was about to commit an offence punishable on indictment, namely, larceny. The evidence was that the appellant, being known to the police, was watched by police officers; that he was seen to go to a block of flats called Portsea Hall where he went up to the second floor, examined the locks of two of the doorways there, and came down again; that, having left Portsea Hall, he went to Maida Vale and examined the locks and door of a block of flats called Clifton Court; and that he was arrested very soon after reaching the street on leaving that block.

Horace Fenton, for the appellant.
R. H. Blundell, for the Crown.

The arguments appear fully from the judgment.

HUMPHREYS, J.: The section in question is one of a very unusual character. Quite contrary to the law which prevails in ordinary cases and requires that a man shall be tried by a jury without the jury being informed of his past unless he desires that they should be so informed and puts his character in issue, this section provides as follows: "Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes be guilty of an offence against this Act, and be liable to imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstances or any of them . . . Thirdly. If he is found in any place, whether public or private, under such circumstances as to satisfy the Court before whom

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he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction." The appellant was indicted under the terms of the third clause, the indictment alleging, first, that he had been convicted at the Central Criminal Court of a crime in 1940, that a previous conviction was then proved against him, and that within seven years immediately after the expiration of the sentence then passed on him, namely, on December 2, 1943, he was found in certain public and private places, to wit, Portsea Hall and Clifton Court, in the county of London, in such circumstances as to satisfy the Court before which he was brought that he was about to commit an offence punishable on indictment, namely, larceny. No point was made at the trial and no point or objection was raised on this appeal regarding the fact that the appellant seems to be charged in that indictment with two offences, inasmuch as it is alleged that he was found at two separate places, in each case in such circumstances as to satisfy the Court that he was about to commit an offence.

One of the points taken by Mr. Fenton was that, in effect, the indictment was bad on the face of it because it charged the appellant with being about to commit an offence punishable on indictment, namely, larceny, which is a felony, and that by the very terms of this statute felony is not an "offence". That seems a very startling proposition. There is no doubt, however, that the language of the interpretation section, section 20, does give rise to verbal difficulty. It provides that "crime" means "any felony" or certain other named offences, and continues: "The expression 'offence' means any act or omission which is not a crime as defined by this Act, and is punishable on indictment or summary conviction." Mr. Fenton argued that the result of those two definitions is that "crime" includes every felony, and, therefore, includes larceny, and "offence", being defined as something which is not a crime, obviously does not include larceny, and, there-

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fore, the indictment is bad in alleging that the appellant was about to commit an "offence", namely, larceny. It seems odd that in all the years from 1871 up to the present time, so far as the Court is aware, that point has never been raised. Whatever may be the possible interpretation of section 20, in our opinion it is plain that the Act of Parliament cannot have intended to provide that an "offence" in such circumstances as the present did not include larceny, and that larceny was not an "offence", the circumstances of being about to commit which was made an offence under section 7 of the Act. If Parliament had intended such a thing, it would be a complete absurdity. Perhaps it is a sufficient answer to the contention of counsel to say that, in our opinion, the section can mean no more than that the expression "offence" may include a "crime" as defined in the section as well as any act or omission which is not a "crime" as so defined, but is punishable on indictment or summary conviction. That point, therefore, fails. It would, in any event, fail on the ground that the point ought to have been taken by motion to quash the indictment if the indictment was bad. By the old practice the matter would not have been considered after the verdict, whether the allegation was good or not, unless application had been made to quash the indictment.

The much more substantial point taken on behalf of the appellant is put in two ways. First, counsel for the appellant says that the Act requires that the person who is to come within the terms of the third paragraph of section 7 should be arrested at the place, whether public or private, where it is alleged that he was about to commit the offence. We are not inclined to agree that there is any necessity for this Court to hold that the word "found" is intended to be equivalent to the word "arrested". According to the ordinary English language it would certainly not be. It would have been very easy, if what is contended for had been desired, so to word the statute that a person who was *arrested in certain circumstances* might be found guilty of a crime, but that is not what this sub-section provides. It states that the person must be *found*

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doing certain things. The Court is indebted to counsel for the Crown for having brought to their attention MORAN *v.* JONES (1911), 75 J. P. 411, a decision of a Divisional Court on a case stated. The offence charged in that case was under section 4 of the Vagrancy Act, 1824, which provides: "Every person being found in or upon any dwelling-house, warehouse, coach house, stable or out-house, or, in any enclosed yard, garden or area, for any unlawful purpose", is to be deemed a rogue and vagabond, and the question raised was the meaning in that section of the word "found". We see no reason why the meaning to be given to the word in the statute before us should not be the same meaning as that given in MORAN *v.* JONES to the word in the enactment then under consideration. Bray, J., reading the judgment of Bankes, J., in that case, which he also adopted, said (at p. 412): "In order to be found upon premises a person must be upon those premises, and the offence, therefore, consists in being upon premises for an unlawful purpose and being found there. It is not, in my opinion, sufficient for a person to be upon the premises for an unlawful purpose unless he is also found there. What constitutes a finding within the meaning of the section? The simplest case would be a case of apprehension upon the premises. Actual apprehension upon the premises is, however, in my opinion, not necessary to constitute the offence. I think that there may be many cases in which a person is found upon the premises within the meaning of the section although he is not apprehended until after he has quitted the premises." That is a decision which has the full approval of this Court, and we think that the point taken for the appellant on this aspect of the case must fail.

The next point is the perfectly sound and reasonable one that, whatever may be the law with regard to this case, there was no real evidence that the appellant came within the terms of the section under which he was indicted. While it is not necessary that a person should be arrested at the place where it is alleged he was found about to commit an offence, there is no doubt from the language of

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the section that it is necessary that he should be found—even if " found " means no more than " discovered " or " seen "—in such circumstances as to satisfy the Court that he was then and there about to commit an offence. It would not be sufficient to come within the terms of the section that the jury should be satisfied (as, indeed, they might well be satisfied in the case of a person whom they already knew has been previously convicted) that he had it in mind to commit an offence if he had the opportunity. There should be positive evidence that the person charged was then and there about to commit an offence. What is the proof of that in this case? The evidence was that the appellant, being known to the police, was watched by police officers. He was seen to go from Edgware Road to a block of flats called Portsea Hall. He went up to the second floor, examined the locks of the doorways there, and came down again. The indictment charged that he was found at Portsea Hall in such circumstances as to satisfy the Court that he was about to commit an offence there, namely, larceny. Having left Portsea Hall he went by omnibus to Maida Vale, and did very much the same thing of examining the locks and door of a blocks of flats called Clifton Court. He was arrested very shortly after getting into the street on leaving Clifton Court. At his trial he set up an alibi, and the trial took the form of an issue whether he was the man seen by the police or not. The jury convicted the appellant. It may be that, as the result of the nature of the defence, there was no examination by the deputy chairman as to the necessity for proving with great exactness and particularity that the particular offence created by the third paragraph of section 7 was committed by the appellant.

As I have already observed, section 7 is an unusual section in that it requires that the jury shall know that the prisoner before them is a criminal and so a person likely to commit the crime with which he is being charged. In most cases it is precisely that matter about which the greatest possible care is taken to prevent the jury knowing anything. Accordingly, whenever a charge is brought against a person

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under section 7, the presiding Judge and everybody concerned in the case should be meticulously careful to see that the prisoner is convicted, not as the result of the appalling prejudice which must in such circumstances be brought against him, but on clear and unmistakable evidence that he committed the particular charge named in the indictment, quite irrespective of whether he has committed any other offence. I mention that because there is another offence with which the appellant might alternatively have been charged under the third paragraph of section 7. Following on the words that the accused person must be found in such circumstances as to satisfy the Court that he was about to commit an offence are the words: "or was waiting for an opportunity to commit . . . any offence punishable on indictment or summary conviction". It may be in this case that there was ample evidence that the appellant was in all probability waiting for an opportunity to commit some such offence as stealing, but he was not charged with that. He was charged with the specific offence of being about to commit, first, at Portsea Hall, and then at Clifton Court, the offence of larceny. What is the proof that at Portsea Hall he was about to commit the offence of larceny? If he had been interrupted, no doubt, no difficulty would have arisen in proving that he was about to commit a particular offence, but he was not interrupted. It seems to us that the short answer which might have been made on his behalf was that if, when he was found, he was about to commit the offence, why did he not commit it? Nobody stopped him, but he did not commit it. It may be that he had the intention to commit the offence, but it must always be remembered in dealing with this section that an intention to commit an offence is not enough. The prisoner must be about to commit the offence. That may mean much the same thing as that he attempted to commit it. It is clear that there was not enough here to justify a conviction for attempted housebreaking. When we turn to Clifton Court the same observation applies. The appellant was found there examining locks. It may be that his idea was that, if he could

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find a lock suitable for him, he would come back later and commit an offence there, but that will not support a charge under this clause of the section. It must be proved that he was then and there about to commit the offence of larceny which involves, in this case, breaking into the premises to commit larceny. In our opinion, the evidence was insufficient, and there was no sufficient direction to the jury on that intricate matter to enable us to say that the jury appreciated that it was necessary that they should find that he was then and there about to commit this crime before they found him guilty. On the ground that there was no satisfactory evidence that the appellant committed the crime with which he was charged, the appeal must succeed and the conviction be quashed.

The Court would add, without making any general observation about this section, that they think that the police and those who have to deal with these matters, including Courts of justice, would do well to remember that, if the facts of a case are such that a man may equally be charged with two offences, one of which involves proof to the jury that he is of bad character, and the other requires no such proof, it is always desirable that the latter should be selected as the charge to be made against him. Once a jury know that a man is given to committing a particular class of crime, it must be extremely difficult for them to treat him in the same fair and impartial way as they would if they knew nothing whatever about him.

Conviction quashed.

Solicitors: Marris & Shepherd, for appellant; Solicitor to Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE ATKINSON.

SIDNEY ROCHE.

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Antecedents of Prisoner—Evidence after Conviction—Evidence by Army Officer from Prisoner's Army Record.

The proper practice of the Court is to receive after conviction as evidence of a prisoner's antecedents, where the prisoner is a serving soldier, the statement which a properly accredited army officer is prepared to give from the prisoner's army records.

Appeal against sentence.

The appellant was convicted on February 23, 1944, at Chester Assizes of larceny and was sentenced by Hilbery, J., to eighteen months' imprisonment.

No counsel appeared on either side.

THE LORD CHIEF JUSTICE: Before the Court rises, we think it right to refer to a matter which we have observed since the case of Roche was dealt with. In that case, in the judgment delivered by my brother Humphreys, leave to appeal against sentence has already been given, but our attention has been called to a statement made by the learned Judge when an officer of the Royal Corps of Signals was called to give information to the Court after Roche's conviction as to his character. The officer who was called was asked if he knew the man, and his reply was: "No, he has not been a member of my unit. I have been merely detailed to come here and give evidence with regard to him". Upon that the learned Judge said that in those circumstances there was nothing that the officer could tell him, and continued: "I thought that everybody in this country knew one thing about evidence, and

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that is that in the Court there is no such thing as mere hearsay evidence. I thought there was not a person in this country who did not know it, but there appears to be. Army officers appear to be prepared to give me hearsay evidence about men. I cannot hear that ".

Now we think it right to say that that is not in accordance with what we think is the proper practice in such a case. It is to be observed that, if an officer is called to give evidence as to a man's character as it appears from his records, such evidence may very often be in the man's favour. In some cases it may be against him, but it has always been in our experience the practice of the Court, and the proper practice of the Court, to receive the statement which a properly accredited officer is prepared to give from the man's records. If that were not the case, it would follow that a number of witnesses would have to be called, perhaps from all over the country, to give first-hand evidence upon some matter which otherwise could be proved by the mere production of the man's record. In case there is any misapprehension as to the proper practice, we have thought it right to call attention to this matter.

We hope that these observations may prevent any misapprehension in future with regard to the powers and, indeed, the duty of the Court, to hear the evidence of an officer as to the records of an accused soldier.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE CROOM-JOHNSON AND MR. JUSTICE STABLE.

I. C. R. HAULAGE CO., LTD.

1944. 24, 25 & 26 April, 10 May.

Company—Conspiracy to Defraud—Offence Involving Mens Rea—Whether Indictment Properly Laid.

An indictment for a common law conspiracy to defraud lies against a limited company. There are certain offences for which a limited company cannot be indicted, for example, offences such as perjury, which cannot be vicariously committed, or bigamy, which a non-natural person cannot commit vicariously or otherwise; or murder, where the only punishment which can be imposed is corporal; but, apart from these exceptions, a limited company can as a general rule be indicted for the criminal acts of its human agents, and for this purpose there is no distinction between an intention or other function of the mind and any other form of activity.

It does not, however, follow that in every case where an agent of a limited company acting in its business commits a crime that the company is to be held criminally responsible. Whether in any particular case the criminal act of an agent, including his state of mind, intention, knowledge or belief, is to be held to be the act of the company must depend on the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case.

DIRECTOR OF PUBLIC PROSECUTIONS *v.* KENT AND SUSSEX CONTRACTORS, LTD., [1944] 1 K. B. 146, approved and followed.

Appeal against conviction.

The appellant company, together with ten other defendants, was indicted at Kent Assizes for conspiracy to defraud. The appellant company was convicted on December 7, 1943, and was sentenced by the Commissioner of Assize (Mr. Roland Burrows, K.C.) to a fine of £500 and ordered to pay £500 towards the costs of the prosecution.

The appellant company was a private company incorporated

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under the Companies Acts. It had two directors, Ivor Cyril Robarts, who was the managing director and the registered owner of all but one of the issued shares, and his wife, who was the owner of the one remaining share. Their daughter was the secretary of the company and seems to have taken some part in the management of its affairs. The charge arose out of a contract between the appellant company and Messrs. Rice & Son, Ltd., public work contractors, under which the appellant company was to deliver loads of hard core and ballast at a certain site to be paid for at the rate of 8s. a cubic yard. This contract the appellant company performed partly by loading and delivering the hard core in its own lorries driven by its own servants and partly by sub-contractors who were paid by the appellant company at the rate of 7s. 6d. per cubic yard. The substance of the charge against the defendants, who consisted of Robarts, the managing director of the appellant company, two of the appellant company's lorry drivers, a number of sub-contractors and two servants of Messrs. Rice, who, it was alleged, were in a position to check the deliveries of hard core, was that they agreed together to charge Messrs. Rice for a quantity of hard core in excess of that which was in fact delivered.

At the trial a motion was made on behalf of the appellant company to quash the indictment against it, which the learned Commissioner refused. After the trial at Kent Assizes, which lasted twelve days, the jury returned a verdict of guilty against the appellant company, Robarts, the two drivers of the company, the two servants of Messrs. Rice and one of the sub-contractors. The other defendants, who were all sub-contractors, were found not guilty and were discharged. All the defendants against whom a verdict of guilty was returned, with the exception of the one sub-contractor, appealed to the Court of Criminal Appeal, which on April 26, 1944, gave judgment dismissing all the appeals and setting out the grounds of decision, with the exception of those dealing with the point peculiar to the company, namely, that an indictment alleging a common law conspiracy to defraud, which this unquestionably

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was, cannot lie against a limited company. The Court rejected that contention, but reserved stating the grounds on which they based that part of their decision.

Serjeant Sullivan, K.C., and *W. A. L. Raeburn*, for the appellant company.

A. S. Comyns Carr, K.C., and *A. Aiken Watson*, for the Crown.

May 10.—The judgment of the Court was read by:

STABLE, J. (after stating the facts): The question before us is whether a limited company can be indicted for a conspiracy to defraud. Section 33 of the Criminal Justice Act, 1925, removed certain procedural obstacles which had hitherto existed in connection with the trial of criminal offences alleged against corporations. This section did not enlarge the ambit of a company's criminal responsibility, but provided machinery for simplifying its enforcement.

It was conceded by counsel for the appellant company that a limited company can be indicted for some criminal offences, while it was conceded by counsel for the Crown that there were some criminal offences for which a limited company cannot be indicted. The controversy centred round the question where and on what principle the line must be drawn and on which side of the line an indictment such as the present one falls. Counsel for the appellant company contended that the true principle was that an indictment against a limited company for any offence involving as an essential ingredient *mens rea* in the restricted sense of a dishonest or criminal mind must be bad, for the reason that a company, not being a natural person, cannot have a mind honest or otherwise, and that consequently though under certain circumstances it is civilly liable for the fraud of its officers, agents or servants, it is immune from criminal process. Counsel for the Crown contended that a limited company, like any other entity recognised by the law, can as a general rule be indicted for its criminal acts, which from the very necessity

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of the case must be performed by human agency and which in given circumstances become the acts of the company, and that for this purpose there was no distinction between an intention or other function of the mind and any other form of activity.

The offences for which a limited company cannot be indicted are, it was argued, exceptions to the general rule arising from the limitations which must inevitably attach to an artificial entity, such as a company. Included in these exceptions are the cases where, from its very nature, the offence cannot be committed by a corporation, as, for example, perjury, an offence which cannot be vicariously committed, or bigamy, an offence which a limited company, not being a natural person, cannot commit vicariously or otherwise. A further exception, but for a different reason, comprises offences of which murder is an example, where the only punishment the Court can impose is corporal, the basis on which this exception rests being that the Court will not stultify itself by embarking on a trial in which, if a verdict of guilty is returned, no effective order by way of sentence can be made. In our judgment these contentions of the Crown are substantially sound, and the existence of these exceptions, and it may be that there are others, is by no means inconsistent with the general rule.

The appellant company relied on a number of authorities, including the case of PEARKS, GUNSTON AND TEE *v.* WARD, [1902] 2 K. B. 1, a decision under section 6 of the Food and Drugs Act, 1875, and more particularly on a passage in the judgment of Channell, J., at p. 11, where he said: "By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by a servant". This passage was cited with approval in MOUSELL BROS. *v.* L. & N. W. RY., [1917] 2 K. B. 836, at p. 843, *per* Lord Reading, Lord Chief Justice. The actual decision

in PEARKS' CASE (*supra*) does not help the appellant company, as it was held that the limited company was properly convicted of the offence charged, nor do we think that the dictum of the learned Judge contains the implication suggested, inasmuch as at p. 12 in the same judgment Channell, J., expressed his inclination to the view that a corporation could be convicted of an offence under section 3 of the same Act in which criminal intention or knowledge is an essential ingredient.

This view was in a subsequent case adopted as the law, CHUTER *v.* FREETH AND POCOCK, LTD., [1911] 2 K. B. 832, at p. 836. In CHUTER *v.* FREETH AND POCOCK, LTD. (*supra*) a limited company was charged before a magistrate under section 20 (6) of the Sale of Food and Drugs Act, 1899, with giving a purchaser of food a false warranty. The section contains a proviso to the effect that it is a defence to a charge under the section if the person charged proves that when he gave the warranty he believed that it was true. The magistrate, although of opinion that the evidence established the giving of a knowingly false warranty by the company's servant, dismissed the charge against the company on substantially the grounds contended for by the appellant company in this case. The case came before a Divisional Court by way of case stated, where it was decided that the magistrate had taken too narrow a view of the law. Lord Alverstone, C.J., in giving the judgment, in which the other two members of the Court (Pickford, J., and Lush, J.) concurred, said at p. 836: "There is no reason why a warranty should not be given by a corporation. It can give a warranty through its agents, and through its agents it can believe or not believe, as the case may be, that the statements in the warranty are true". This passage, in our judgment, is directly in point on the question we have to decide.

In MOUSELL BROS.' CASE (*supra*) it was held that a limited company was properly convicted of an offence under section 99 of the Railway Clauses Consolidation Act, 1845, of giving a false account with intent to avoid the payment of tolls, the

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basis of the decision (see *per* Lord Reading, C.J., at p. 845, and Atkin, J., at p. 846) being that in relation to that section there was no distinction between a limited company and a natural principal. In our judgment MOUSELL BROS.' CASE (*supra*) does not determine the question we have to decide one way or the other, inasmuch as the construction that the Court placed on that section of the Act of Parliament was that it made the principal criminally responsible for the act of the servant, irrespective of whether the principal was a natural or artificial person or had or had not present in his own mind the intention which was a necessary ingredient in the offence. MOUSELL BROS.' CASE (*supra*) did not decide that under no circumstances a criminal intention in the mind of a servant or agent can be imputed to a principal who is a limited company.

The authority latest in date which the appellant company cited in support of its contention was the case of CORY BROS. & Co., [1927] 1 K. B. 810, where Finlay, J., on motion quashed an indictment against a limited company containing two counts, the first for manslaughter, which is a felony, and the second for an offence under section 31 of the Offences against the Person Act, 1861, a statutory misdemeanour punishable with penal servitude. Both these offences can be punished on conviction with the infliction of a fine, the felony under section 5 of the Offences against the Person Act, 1861, and the misdemeanour by common law. It appears from the report that the substantial argument addressed to the Court was that section 33 of the Criminal Justice Act, 1925, had enlarged the category of offences for which a corporation could be indicted, a contention which, as we think rightly, the learned Judge rejected, holding that the section merely dealt with procedure. The learned Judge advanced no reasons of his own for quashing the whole indictment, simply expressing the view that he felt compelled by the authorities to which his attention had been called to decide as he did. It is sufficient in our judgment to say that inasmuch as that case was decided before the decision in DIRECTOR OF PUBLIC PROSECUTIONS *v.* KENT AND SUSSEX CONTRACTORS, LTD. [1944] 1 K. B. 146, and

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as CHUTER *v.* FREETH AND POCOCK, LTD. (*supra*), was not cited at all, if the matter came before the Court to-day the result might well be different. As was pointed out by Hallett, J., in KENT AND SUSSEX CONTRACTORS' CASE (at p. 157) this is a branch of the law to which the attitude of the Courts has in the passage of time undergone a process of development.

In support of the contention for the Crown we were referred to a number of authorities. The earliest of these to which we think it necessary to refer is PHARMACEUTICAL SOCIETY *v.* LONDON PROVINCIAL SUPPLY ASSOCIATION (1880), 5 App. Cas. 857. The decision in that case, which was earlier than the Interpretation Act, 1889, was that the word "person" in the Act then under consideration did not include an incorporated company, but at p. 869 Lord Blackburn said: "But I may also say now, in order to avoid coming back to it, that I do not feel the least difficulty arising from what seems to have troubled some of the learned Judges in the Court below. If this word does include a corporation—I quite agree that a corporation cannot, in one sense, commit a crime—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death if that be the punishment for the crime; and so, in those senses a corporation cannot commit a crime. But a corporation may be fined, and a corporation may pay damages; and therefore I must totally dissent, notwithstanding what Bramwell, L.J., said, or is reported to have said, upon the supposition that a body corporate or a corporation that incorporated itself for the purpose of publishing a newspaper could not be tried and fined, or an action for damages brought against it for a libel; or that a corporation which commits a nuisance could not be convicted of the nuisance or the like. I must really say that I do not feel the slightest doubt upon that part of the case. If you could get over the first difficulty of saying that the word 'person' here may be construed to include an artificial person, a corporation, I should not have the least difficulty upon those other grounds which have been suggested".

Lord Blackburn's emphatic expression of opinion that a

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limited company can be indicted and convicted for publishing a criminal libel was later accepted by the Court of Appeal (TRIPLEX SAFETY GLASS CO. *v.* LANCEGAY SAFETY GLASS CO. (1934), LTD., [1939] 2 K. B. 395) where it was held that a limited company was entitled to object to answering an interrogatory on the ground that the answer would tend to incriminate it. As an actual condition of mind amounting to express malice may be an element in the offence of libel, it is plain that the Court of Appeal decided that, whatever the principle may be that fixes the line between those offences for which a limited company can and those for which it cannot be indicted, it is not the presence or absence in the human agent of a particular condition of mind. It would be unreasonable to suppose that a limited company can be indicted for a criminal libel only in those cases in which express malice is not proved or that it could defeat a prosecution by proving that its duly authorised agent was in fact actuated by malice.

The latest authority is DIRECTOR OF PUBLIC PROSECUTIONS *v.* KENT AND SUSSEX CONTRACTORS, LTD., [1944] 1 K. B. 146. A limited company was charged with offences under a Defence Regulation which involved an intent to deceive. The justices dismissed the informations on the ground that a body corporate could not be guilty of the offences charged inasmuch as an act of will or state of mind which could not be imputed to a corporation was implicit in the commission of these offences. On a case stated to a Divisional Court this conclusion of law on the part of the justices was held to be erroneous and the case was remitted to them to hear and determine. It is clear that the state of mind involved was a dishonest state of mind, namely, an intention to deceive and that the state of mind was an essential element in the offence. There is a distinction between that case and the present, in that there the offences were charged under a regulation having the effect of a statute, whereas here the offence is a common law misdemeanour; but in our judgment this distinction has no material bearing on the question we have to decide.

At p. 151 Viscount Caldecote, L.C.J., said : " The real point

we have to decide . . . is . . . whether a company is capable of an act of will or of a state of mind, so as to be able to form an intention to deceive or to have knowledge of the truth or falsity of a statement", and after dealing with a number of authorities, he proceeds at p. 155: "The offences created by the regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular. There was ample evidence, on the facts as stated in the special case, that the company, by the only people who could act or speak or think for it, had done both these things, and I can see nothing in any of the authorities to which we have been referred which requires us to say that a company is incapable of being found guilty of the offences with which the respondent company was charged." In his judgment in the same case Macnaghten, J., says as follows (at p. 156): "It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate. . . . If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that according to the authorities which my Lord has cited his knowledge and intention must be imputed to the company". With both the decision in that case and the reasoning on which it rests, we agree.

In our judgment, both on principle and in accordance with the balance of authority, the present indictment was properly laid against the appellant company, and the learned Commissioner rightly refused to quash.

We are not deciding that in every case where an agent of a limited company acting in its business commits a crime the company is automatically to be held criminally responsible. Our decision only goes to the invalidity of the indictment on the face of it, an objection which is taken before any evidence is led and irrespective of the facts of the particular case.

Whether in any particular case there is evidence to go to

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a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and, in cases where the presiding Judge so rules, whether the jury are satisfied that it has been so proved, must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case.

It was because we were satisfied on the hearing of the appeals in this case that the facts proved were amply sufficient to justify a finding that the acts of Robarts, the managing director, were the acts of the company and the fraud of that person was the fraud of the company, that we upheld the conviction against the company, and, indeed, on the appeal to this Court no argument was advanced that the facts proved would not warrant a conviction of the company assuming that the conviction of Robarts was upheld and that the indictment was good in law.

Appeal dismissed.

Solicitors: Braby & Waller, for appellant company; Wilkinson, Howlett & Moorehouse, for the Crown.

[IN THE HOUSE OF LORDS.]

BEFORE

THE LORD CHANCELLOR (VISCOUNT SIMON), LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT AND LORD PORTER.

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WILLIAM STIRLAND.

Evidence—Character of Prisoner—Cross-Examination—Statement by Prisoner that he had Never been Charged with Any Offence — Cross-Examination on Suspicion of Forgery — Not Permissible as Relevant Either to Character or Credit—Meaning of "Charge"—"Character"—Objection to Admissibility of Evidence not Taken at Trial—Whether Open on Appeal—

Proviso Applied—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1, *proviso* (*f*) (*ii*).

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By section 1 of the Criminal Evidence Act, 1898, proviso (*f*): "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character . . ."

The appellant, who was charged with forgery, put his character in issue, specifically stating that he had never before been charged with any offence. After he had been asked in cross-examination about the circumstances of the termination of his employment with a bank, and he had given his own account of the reasons for that termination, the following further cross-examination occurred: (Q.) May I suggest another reason to you? Were you questioned about a suggested forgery? (A.) No. (Q.) Did you leave after interrogation about a particular signature? (A.) I did not.

Held, that the appellant might fairly be understood to have used the word "charged" in his evidence in the sense which it bore in section 1 (*f*) of the Act—that is to say "accused before a Court", not "suspected or accused without prosecution". The concluding cross-examination above referred to was, therefore, not relevant either as a challenge to the veracity of the appellant's evidence or as going to disprove good character, and was therefore inadmissible. In view, however, of the overwhelming nature of the rest of the evidence, the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied and the appeal dismissed.

Held, further, that the following general propositions should be laid down with regard to cross-examination of a prisoner as to credit: 1. The accused in the witness box may not be asked any question "tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character unless" one or other of the three conditions set out in proviso (*f*) of section 1 of the Act of 1898 is fulfilled. 2. He may, however, be cross-examined as to any of the evidence he has given in chief, including statements as to his good record, with a view to testing his veracity or accuracy, or to showing that he is not to be believed on his oath. 3. An accused who "puts

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his character in issue" must be regarded as putting the whole of his past record in issue. He cannot assert his good conduct in certain respects without exposing himself to inquiry as to the rest of his record as far as this tends to disprove a claim for good character. 4. An accused is not to be regarded as depriving himself of the protection of the section because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses: TURNER (1944), 30 Cr. App. R. 9; [1944] K. B. 463. 5. It is no disproof of good character that a man has been suspected, or accused, of a previous crime. Such questions as "Were you suspected?" or "Were you accused?" are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has sworn expressly to the contrary (see rule 2 above). 6. The fact that a question put to the accused is irrelevant is in itself no reason for quashing his conviction, though it should have been disallowed by the Judge. If the question is not only irrelevant but is unfair to the accused as being likely to distract the jury from considering the real issues, and so lead to "a miscarriage of justice" (Criminal Appeal Act 1907, s. 4 (1)), it should be disallowed, and if not disallowed, is a ground on which an appeal against conviction may be based.

It is not a proper use of counsel's discretion to raise no objection to the reception of inadmissible evidence during the trial in order to preserve a ground of objection for a possible appeal, and the failure of counsel to object at the time may have a bearing on the question whether the prisoner was really prejudiced; but the failure to object when the evidence was given does not necessarily cause the right to object on appeal to be forfeited.

WATTAM (1941), 28 Cr. App. R. 80, considered.

Semble, "character" in the above section includes both general reputation and the actual moral disposition of the prisoner as known to the individual witness.

Appeal from an order of the Court of Criminal Appeal dismissing an appeal against conviction (29 Cr. App. R. 154).

The appellant was convicted at the Central Criminal Court on October 12, 1943, of forgery and of obtaining and attempting to obtain money by forged instruments and was sentenced by the Common Serjeant to three years' penal servitude.

The appellant was employed by the British Broadcasting Corporation for three years ending on December 31, 1942.

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The case for the prosecution was that on that date he stole six sets of order forms and forged them; that he then had orders made out, retaining the top copies himself and planting duplicates in the appropriate departments of the Corporation; and that after he had left their service, on various dates up to June, 1943, he sent in from accommodation or bank addresses invoices representing work done or goods supplied, in some cases obtaining, and in other cases attempting to obtain, cheques from the Corporation.

The appellant put his character in issue, and specifically stated that he had never before in his life been charged with any offence. In cross-examination he was asked a number of questions about his employment in a bank, whether he had there become some sort of an expert in handwriting and why that employment was terminated. After the appellant had given his reasons for the termination of the employment, the following further cross-examination took place: "(Q.) May I suggest another reason to you? Were you questioned about a suspected forgery? (A.) No. (Q.) Did you leave after an interrogation about a particular signature? (A.) I did not". The Judge in his summing-up advised the jury entirely to disregard this matter.

The appellant appealed to the Court of Criminal Appeal and on November 20, 1943, the Court—The Lord Chief Justice, Atkinson, J. and Croom-Johnson, J.—dismissed the appeal on the ground that the cross-examination was relevant and admissible as going to the credibility of the appellant.

The appellant appealed to the House of Lords on a fiat from the Attorney-General.

G. Crispin (*D. H. Figg* with him), for the appellant:

The cross-examination to which exception is taken suggested that the appellant had been charged by the bank with forgery, and offended against the principle laid down by the House in MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 152; [1935] A. C. 309. The questions were of a most damning nature, the suggestion being that the appellant

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had come under suspicion of having committed a criminal offence for which he might have been prosecuted. Once the questions had been put, the mischief occasioned by them was incurable: MORRISEY (1932), 23 Cr. App. R. 188. The present case was quite as strong as that of MAXWELL (*supra*). If a charge that is not proved may be no more than a misfortune, the suspicion of having committed forgery may equally be so. In any event, the questions were irrelevant either to the issue before the jury or to the appellant's credibility. Even if the questions were relevant to credibility, they should not have been put if there was any risk of the jury being misled into thinking that they went not to credibility but to the probability of the appellant having committed the offence with which he was charged: MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R., at p. 173; [1935] A. C., at p. 321. It is true that no objection was taken to these questions at the time when they were asked. If the principle laid down in WATTAM (1941), 28 Cr. App. R. 80, that the failure to take objection at the time is fatal to the objection being taken on appeal, is of general application, it should at least be confined to cases where the introduction of the accused person's bad character has been due to inadvertence. [He referred also to ELLIS, 5 Cr. App. R. 41, at p. 61; [1910] 2 K. B. 746, at p. 763.]

The Attorney-General (*Sir Donald Somervell, K.C.*), for the Crown:

If an accused person puts his character in issue, there is no way of limiting the introduction of character by putting it on a high or low or particular plane. It is common ground that in the present case the appellant had put his character in issue; therefore, any question germane to character could be put by the prosecution. [He referred to DUNKLEY, 19 Cr. App. R. 78; [1927] 1 K. B. 323.] Before 1898, evidence of character was that of general reputation only; since then it has become recognised that an accused person can be asked questions about specific incidents as being relevant to character. Speaking broadly, the appellant in the present case was liable to be asked any question relating to bad character,

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and it was not improper to suggest that he had terminated his employment at a bank in a hurry and in suspicious circumstances. In any event, the questions were relevant as going to credibility. They were directly relevant to the appellant's previous account of his own reasons for leaving the bank. The appellant in MAXWELL'S CASE (*supra*) had not said that he had never been charged with any offence, and accordingly the mere fact that he had been charged did not go to credibility. A person can have a bad character without having been previously convicted, and MAXWELL'S CASE (*supra*) is not authority for the proposition that in no circumstances can questions with regard to suspected offences be admissible. On the question whether counsel is debarred from taking a point in the Court of Criminal Appeal if he has not taken the point at the trial, it is conceded that the expressions used in WATTAM (*supra*) and the cases which it followed may have gone rather far, and DAVIES AND RIDLEY (1909), 2 Cr. App. R. 133, appears to be a more accurate statement of the position.

J. Scott Henderson, following for the Crown:

Once character is in issue, questions going to credibility can be asked even if they suggest that the accused person has been convicted of or charged with another offence or is of bad character. The prosecution are, however, bound by the answer of the accused person, except that if the accused person fails to admit a previous conviction that conviction may be proved against him. The relevance of the question does not depend on the answer. [He referred to HOBBS *v.* TINLING (C. T.) & Co., [1929] 2 K. B. 1.] In any event, the evidence for the prosecution was overwhelming, and it is submitted that the House might apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

G. Crispin, in reply:

Whatever the answers to the questions were, the questions were in themselves inadmissible. The position cannot be that the Judge has to wait for the answer before giving his ruling. On the question whether the House should apply the proviso

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to section 4 (1) of the Criminal Appeal Act, 1907, it is submitted that the circumstances of this case are very similar to those of MAXWELL'S CASE (*supra*). There the case for the prosecution was extremely strong, and in the present case the case for the prosecution was very strong, but in each case there was a defence of substance.

The House took time for consideration.

June 21, 1944.—The following opinions were read:

THE LORD CHANCELLOR (VISCOUNT SIMON): My Lords, the appellant was convicted on October 7, 1943, before the Common Serjeant (His Honour Judge Beazley) on six charges of forgery, and was sentenced to be kept in penal servitude for three years. He appealed to the Court of Criminal Appeal (Viscount Caldecote, C.J., Atkinson, J., and Croom-Johnson, J.) against the conviction and sentence, but the appeal was dismissed, the judgment of the Court being delivered by Atkinson, J. The appellant obtained from the Attorney-General a certificate that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, and that it was in his opinion desirable in the public interest that a further appeal should be brought. Accordingly this appeal has been brought before the House. The point of law immediately involved is as to the admissibility of certain questions put in cross-examination of the accused at the trial after he had put his character in issue, but at the end of the argument the House intimated that, whether the point of law raised on the accused's behalf was well founded or not, no substantial miscarriage of justice could be regarded as having actually occurred and consequently that the conviction should stand. Apart altogether from the impeached questions (which the Common Serjeant in his summing up advised the jury entirely to disregard), there was an overwhelming case proved against the accused. The trial had lasted two full days, but the jury took only a few minutes to consider its verdict and the Judge stated that he considered the verdict "perfectly right" When the transcript is examined, it is evident that no reason-

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able jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice and this is the proper test to determine whether the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied. The passage in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72, at p. 96; [1935] A. C. 462, at p. 483, where Viscount Sankey, L.C., observed that in that case, if a jury had been properly directed, it could not be affirmed that they would have "inevitably" come to the same conclusion should be understood as applying this test. A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence; but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict. That assumption, as the Court of Criminal Appeal intimated, may be safely made in the present case.

The Court of Criminal Appeal has recently in HADDY, 29 Cr. App. R. 182; [1944] 1 K. B. 442, correctly interpreted section 4 (1) of the Criminal Appeal Act and the observation above quoted from WOOLMINGTON'S CASE (*supra*) in exactly this sense.

It remains to decide the point of law on account of which the appeal has been brought to this House. The appellant clearly put his character in issue in the course of the trial, and that more than once, as appears from the quotations which follow:—(a) Mr. French, a witness for the prosecution, was asked in cross-examination and answered: (Q.) "During the time Stirland was employed by the Corporation, you had no complaint to make about him?" (A.) "No." (Q.) "You found him a loyal and faithful servant?" (A.) "Yes." (Q.) "You had no reason at all to suspect him. That is right, it is not?" (A.) "Yes." (b) Again, a police inspector who was also called for the prosecution gave the following evidence

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in answer to questions from the appellant's counsel:—(Q.) "He is a man of good character?" (A.) "Yes; he has not been charged before." (c) Further, the appellant went into the witness-box and was asked in chief: "Have you ever in your life been charged with any offence whatever?" to which he answered "No". As the result of these questions and answers, counsel for the prosecution felt justified in cross-examining the appellant as follows:—(Q.) "Why did you leave the Westminster Bank?" (A.) "For two reasons. The first reason was that I have other interests outside the bank, which the bank did not like, and they were entirely literary interests, when I came to London. The second reason was that I had the offer of an opportunity in London for going in for advertising, and therefore I resigned from the Westminster Bank and came to London." (Q.) "May I suggest another reason to you? Were you questioned about a suggested forgery?" (A.) "No." (Q.) "Did you leave after an interrogation about a particular signature?" (A.) "I did not." Finally, in re-examination, after explaining that he left the bank because his family expenses necessitated his earning more money than he was receiving as salary, the appellant said "the suggestion that was made by counsel for the prosecution is untrue in every particular". (Q.) "You say your leaving the bank had nothing whatever to do with any question of your dishonesty?" (A.) "No. I even had a reference from the Westminster Bank, which I told you about this morning." (Q.) "The bank gave you a reference?" (A.) "Yes, from the Leeds office." (Q.) "After you left the bank?" (A.) "Yes."

It will be observed that these questions were not put in order to suggest a previous conviction or even a previous charge (if by "charge" is meant a criminal proceeding), but insinuated that the appellant had left his previous employment under suspicion, whether well or ill founded, of dishonesty. The prosecutor, of course, put such questions relying on material in his brief—indeed, after conviction, a chief inspector of police, when asked about the convict's

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history, gave information as to the circumstances in which the appellant left the Westminster Bank which corresponded to the questions put. But this provides no answer to the problem whether such questions were legitimate at the stage when the issue of the appellant's guilt or innocence of the crime charged was still before the jury.

Before your Lordships it was contended that this cross-examination was wholly inadmissible, as tending to suggest that the appellant had been guilty of a crime other than that with which he was charged and as being irrelevant to the question of his guilt in respect of the crime for which he was being tried.

The right of a prisoner to give evidence on his own behalf was not conferred until 1898 and is governed by the Criminal Evidence Act of that year. The relevant portion of the first section runs thus:—"1. Every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings . . . Provided as follows:—. . . (*e*) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged. (*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or (iii) he has given evidence against any other person charged with the same offence."

This House has laid it down in MAXWELL *v.* DIRECTOR OF

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PUBLIC PROSECUTIONS, 24 Cr. App. R. 152; [1935] A. C. 309, that while paragraph (*f*) of this section absolutely prohibits any question of the kind there indicated being put to the accused in the witness-box unless one or other of the conditions (i), (ii) or (iii) is satisfied, it does not follow that such questions are in all circumstances justified whenever one or other of the conditions is fulfilled. Viscount Sankey, L.C., in delivering the judgment of the House defined the matter to be decided in MAXWELL'S CASE thus: whether it was permissible in the particular facts of that case for the prosecution to ask the prisoner (who had put his character in issue) whether on a previous occasion he had been charged with a similar offence, the charge having been tried and having resulted in an acquittal. The House decided that in the circumstances the question was not admissible, for the previous acquittal proved nothing against the accused—"the mere fact of a charge cannot in general be evidence of bad character or be regarded otherwise than a misfortune" (at pp. 172 and 319 of the respective reports)—and moreover the accused had not said that he had never previously been charged, so that the question could not be justified as a challenge to the accused's veracity and as seeking to show that he was a person not to be believed on his oath. The question, in the opinion of the House, was therefore irrelevant and at the same time was "likely to lead the minds of the jury astray into false issues", inasmuch as it might suggest to the jury that the accused had committed a similar offence before and therefore was likely to have been guilty of the crime now charged against him.

Atkinson, J., in delivering the judgment of the Court of Criminal Appeal in the present case, thought that there was nothing in the trial which conflicted with the decision in MAXWELL'S CASE (*supra*), largely because the appellant swore that he had never in his life "been charged with any offence whatever". Therefore, argued Atkinson, J., cross-examination about the allegedly suspicious circumstances in which the appellant left the bank was relevant and admissible to disprove his denial that he had ever been "charged"

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I should agree with the learned Judge that if the accused in the witness-box makes a statement of fact which the prosecution does not accept, he is liable to be cross-examined on the statement with a view to showing that it is not true. And this applies to a statement as to the accused's past record where he puts his character in issue just as much as to a statement on any other matter. But this is all subject, as explained below, to the Judge's discretion to disallow any question which in the circumstances he thinks to be unfair.

It is necessary, however, to guard against a possible confusion in the use of the word " charged ". In paragraph (*f*) of section 1 of the Act of 1898 the word appears five times and it is plain that its meaning in the section is " accused before a Court " and not merely " suspected or accused without prosecution ". When the appellant denied that he had ever been " charged ", he may fairly be understood to use the word in the sense it bears in the statute and to mean that he had never previously been brought before a criminal Court. Questions as to whether his former employer had suspected him of forgery were not therefore any challenge to the veracity of what he had said. Neither were they relevant as going to disprove good character: the most virtuous may be suspected, and an unproved accusation proves nothing against the accused. But the questions, while irrelevant both to the charge which was being tried and to the issue of good character, were calculated to injure the appellant in the eyes of the jury by suggesting that he had been in trouble before, and were therefore not fair to him. They should not have been put, and, if put, should have been disallowed.

It must not be forgotten that the Judge presiding at a criminal trial has a discretion (as Lord Sankey said in MAXWELL'S CASE, 24 Cr. App. R., at p. 173; [1935] A. C., at p. 321) to disallow questions addressed to the accused in cross-examination if he considers that such questions, having regard to the issues before the jury and to the risk of the jury being misled as to what those issues really are, would be " unfair ", and the Judge's disallowance cannot be challenged on appeal.

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A question as to whether the accused, who has put his character in issue, was not suspected of a previous crime of which he was never charged in Court, or if charged was acquitted, is an example of a case where the Judge should intervene. It is true that a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent. But when MAXWELL'S CASE (*supra*) decided that where the prosecution had enough evidence to indict a man for a crime, but not enough to convict, no questions can be asked as to that incident in a later trial at which he puts his character in issue, how can mere suspicion alleged to have been entertained by his previous employer on an earlier occasion be a legitimate topic for cross-examination to credit?

There is perhaps some vagueness in the use of the term "good character" in this connection. Does it refer to the good reputation which a man may bear in his own circle, or does it refer to the man's real disposition as distinct from what his friends and neighbours may think of him? In ROWTON (1865), L. & C. C. C. R. 520; 34 L. J. M. C. 57, on a re-hearing before the full Court, it was held by the majority that evidence for or against a prisoner's good character must be confined to the prisoner's general reputation, but Erle, C.J., and Willes, J., thought that the meaning of the phrase extended to include actual moral disposition as known to an individual witness, though no evidence could be given of concrete examples of conduct. In the later case of DUNKLEY, 19 Cr. App. R. 78; [1927] 1 K. B. 323, the question was further discussed in the light of the language of the section, but not explicitly decided. I am disposed to think that in paragraph (*f*) (where the word "character" occurs four times) both conceptions are combined.

The historical development of the English rule that the prosecution in seeking to prove the crime charged may not, generally speaking, introduce evidence as to the previous bad character of the accused, but that the accused may call evidence in support of his previous good reputation, is difficult

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to trace. Sir James Stephen in his *History of the Criminal Law of England* (Vol. I, p. 449) has some interesting observations on the subject. See also Kenny's *Outline of Criminal Law*, pp. 397—400. Stephen points out that before the Norman Conquest "the character of the accused decided the question whether he was to be allowed to make his purgation by compurgators or was to be sent to the ordeal. In later times the character of the accused must have weighed with the jury who acted as witnesses". Under the Stuarts, evidence was freely given of particular crimes or misconduct unconnected with the matter in issue committed by the prisoner. The earliest instance which Stephen records of evidence being admitted of the prisoner's good character is at the trial of Colonel Turner for burglary in 1664 (6 St. Tr. 613). In an early (2nd) edition of *Russell on Crimes* published in 1828 (Vol. II, p. 703) there is a note stating that "formerly evidence of the prisoner's good character was admitted in capital cases only, *in favorem vitæ*". The rule, however, was later extended to cover any prosecution for positive crime. "The true line of distinction", said Chief Baron Eyre in ATT.-GEN. *v.* BOWMAN (1791), 2 B. & P. 532, is "that in a direct prosecution for a crime such evidence is admissible, but where the prosecution is not directly for the crime but for the penalty, as in this information" (it was an information for keeping false weights) "it is not." By the end of the eighteenth century evidence of good character was constantly admitted. A remarkable instance is provided by the trial of Arthur O'Connor for high treason in 1798 (27 St. Tr. 31) where Mr. Erskine was one of a large number of distinguished persons who testified to the prisoner's character for loyalty. Erskine, indeed, in the course of his evidence (p. 40) stated that with the choice before him of defending Mr. O'Connor or of giving evidence as to his good character, he chose the latter, and the Attorney-General, Sir John Scott (p. 113), told the jury that "in all doubtful cases, character ought to have very considerable weight indeed". Cockburn, C.J., in ROWTON (1865), L. & C. C. C. R., at p. 530; 34 L. J. M. C., at p. 61, observes

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that " although, logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a ground for the presumption and probability of guilt as previous good character lays the foundation for the presumption of innocence, yet the prosecution cannot go into evidence as to bad character. This allowing of evidence of a prisoner's good character to be given has grown up from a desire to administer this part of our law with mercy as far as possible. It has sprung up from the time when the law was, according to the common estimation of mankind, severer than it should have been ".

It is most undesirable that the rules which should govern cross-examination to credit of an accused person in the witness-box should be complicated by refined distinctions involving a close study and comparison of decided cases, when in fact these rules are few and can be simply stated. The following propositions seem to cover the ground. (I am omitting the rule which admits evidence tending to prove other offences where this evidence is relevant to the issue being tried, as helping to negative accident or to establish system, intent or the like.)

1. The accused in the witness-box may not be asked any question " tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character unless " one or other of the three conditions set out in paragraph (*f*) of section 1 of the Act of 1898 is fulfilled.

2. He may, however, be cross-examined as to any of the evidence he has given in chief, including statements as to his good record, with a view to testing his veracity or accuracy, or to showing that he is not to be believed on his oath.

3. An accused who " puts his character in issue " must be regarded as putting the whole of his past record in issue. He cannot assert his good conduct in certain respects without exposing himself to inquiry as to the rest of his record so far as this tends to disprove a claim for good character.

4. An accused is not to be regarded as depriving himself of

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the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses: TURNER, 30 Cr. App. R. 9; [1944] K. B. 463.

5. It is no disproof of good character that a man has been suspected, or accused, of a previous crime. Such questions as "Were you suspected?" or "Were you accused?" are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has sworn expressly to the contrary (see rule 2 above).

6. The fact that a question put to the accused is irrelevant is in itself no reason for quashing his conviction, though it should have been disallowed by the Judge. If the question is not only irrelevant but is unfair to the accused as being likely to distract the jury from considering the real issues, and so lead to "a miscarriage of justice" (Criminal Appeal Act, 1907, s. 4 (1)), it should be disallowed, and if not disallowed, is a ground on which an appeal against conviction may be based.

A further question was raised in the present appeal which can be briefly disposed of. Atkinson, J., in delivering the judgment of the Court of Criminal Appeal, called attention to the decision of that Court in WATTAM (1941), 28 Cr. App. R. 80, where the present Lord Chief Justice quoted the observation of Lord Hewart, C.J., in FIRTH (1938), 26 Cr. App. R. 148, and treated that observation as amounting to a ruling that a conviction cannot be quashed on the ground of the improper admission of evidence prejudicial to the prisoner unless an application is made at the time by counsel for the prisoner for the trial to be begun again before another jury. No such application was made in the present case. I doubt whether Lord Hewart's words require so strict a construction, but, in any case, it seems to me there cannot be a universal rule to this effect. It has been said more than once that a Judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself (see ELLIS, 5 Cr. App. R. 41, at p. 62; [1910] 2 K. B.

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746, at p. 764). If that be the Judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt, as Bray, J., said at pp. 61 and 763 of the respective reports in the same case, the Court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal. But where, as here, the reception or rejection of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice. There is nothing in the Act of 1898 to suggest that such an objection is necessarily invalid unless taken at the time, and in other branches of the law the right to object on appeal that evidence was inadmissible is not necessarily forfeited by the failure to object when the evidence was given. The object of British law, whether civil or criminal, is to secure, as far as possible, that justice is done according to law, and if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by counsel at the trial is not necessarily conclusive.

My Lords, my noble and learned friend Lord Russell of Killowen, who is not able to be here, has authorised me to say that he concurs in this opinion.

LORD THANKERTON: My Lords, I have had an opportunity of considering the opinion which has just been delivered by my noble and learned friend on the Woolsack and I find myself in complete agreement with it.

LORD WRIGHT: My Lords, I also agree.

LORD PORTER: My Lords, I agree.

Appeal dismissed.

Solicitors: J. H. Milner & Son, for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LEWIS AND MR. JUSTICE ASQUITH.

ROBERT YOUNG.

1944.
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Public Mischief—Neglect of Duty—Building Defective Air-Raid Shelters—Whether Indictment Lies.

Any offence which tends to the prejudice of or which causes expense to the public may constitute a public mischief, although the charge be based on neglect of duty or negligence.

The appellant was indicted with another person (*inter alia*) on a count which charged them with conspiracy to effect a public mischief, the particulars of offence being that they "conspired together and with other persons unknown to effect a public mischief by building . . . air-raid shelters in a manner so deficient in structure as to fall far short of the standard of protection afforded by the specifications provided and so as to cost the [borough] council" a large sum of money for re-building.

Held, that the count was properly left to the jury.

HIGGINS ((1801), 2 East 4), BRAILSFORD ([1905] 2 K. B. 730), PORTER (3 Cr. App. R. 237; [1910] 1 K. B. 369), and MANLEY (24 Cr. App. R. 25; [1933] 1 K. B. 529), followed and applied.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on February 23, 1944, of conspiracy to effect a public mischief and was sentenced by Cassels, J., to nine months' imprisonment in the second division.

The appellant was a clerk of works in the service of the Hammersmith Borough Council. In 1940 the Home Office moved local councils to erect air-raid shelters in the streets for the use of the public, and Mr. Webber, an architect, was employed by the borough of Hammersmith to place and supervise the erection of a large number of shelters according to Home Office specifications. The architect, who was lent the services of the appellant as his clerk of works, contracted with a

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firm of Davies & Co., of whom George Henry Davies was the proprietor and principal, to erect the shelters. Davies and the appellant were both given the necessary specifications and drawings, which included details of the thickness and steel reinforcement of the concrete roofs. From time to time the appellant gave a progress report to the architect, stating that so many more shelters had been satisfactorily completed, and on the strength of these reports, and the like from Davies, the architect certified for payment from the borough treasurer to Davies & Co.

When a large number of shelters had been built, a bomb destroyed one of them, and the body of a girl was found in the debris. It was in respect of this death that a charge of manslaughter was included in the indictment. Inquiries were made, and it was found that, so far from complying with the specifications, there was virtually no lateral reinforcement in the roofs at all, and in the opinion of experts the shelters were actually a menace to anyone using them for the purpose for which they were built. In due course the borough rebuilt the shelters according to the specifications at the cost of some £17,647. After further inquiries both Davies and Young were arrested.

The indictment contained seven counts. The first count charged the appellant and Davies with manslaughter, but this count was withdrawn during the trial. On counts two to six inclusive, which charged the obtaining by false pretences of the sums paid to Davies & Co., the appellants were acquitted. The seventh count charged the appellant and Davies with conspiracy to effect a public mischief, the particulars of offence being in the following terms: "George Henry Davies and Robert Young, between the 1st day of May, 1940, and the 1st day of March, 1941, in the County of London, conspired together and with other persons unknown, to effect a public mischief by building 120 buildings, which they well knew would be used by the citizens of the borough of Hammersmith as air-raid shelters, in a manner so deficient in structure as to fall far short of the standard of protection afforded by the

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specifications provided, and so as to cost the said council £17,674 of its moneys for the rebuilding of the said buildings in accordance with the said specifications." Both the appellant and Davies were convicted on this count.

John Bassett, for the appellant.
Christmas Humphreys, for the Crown.

THE LORD CHIEF JUSTICE (after stating the facts): The first question which we have to consider is whether the learned Judge was right at the trial in ruling that, if the jury found certain circumstances, the circumstances amounted to a public mischief. The passage in which the learned Judge gave that ruling is at p. 293 of the transcript where he is reported to have said this: "If you find these facts to be true, if you come to the conclusion that these roofs were as they have been described, 'duds' and 'shoddy', when they should have been as the specification required; that the defendants handed them over to the Hammersmith Borough Council as genuine, strong, reinforced concrete air-raid shelters when they must have known, and must be taken to have known, that the so-called reinforcement in scores of these shelters was rubbish and useless; if you conclude that the defendants brought this state of affairs about by recklessly supervising so casually, by such a reckless indifference to what was going on with regard to the roofs that the reinforcement was no reinforcement at all in the proper sense of the word, bearing in mind the public use for which these shelters were intended and the terrible danger against which these shelters were supposed to afford protection; if you come to those conclusions, and further find that the defendants' conduct led to a big expenditure of public money, I hold in law that that is a public mischief." That ruling was no doubt given by the learned Judge in accordance with what has been laid down in more than one case, that it is for the Judge on a charge of this sort to say whether certain facts amount to a public mischief and for the jury to find whether the facts so existed or not.

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Now it is said that this is the first time in which a case of neglect of duty or of negligence has been charged as causing or effecting a public mischief. It seems to us to be too late to say, and indeed it is not attempted to say, that the charge of public mischief is not known to the law. A mention of the more modern authorities upon this branch of the law is to be found in HIGGINS (1801), 2 East 4. The point which was really argued and decided in that case was that on the facts of the case there was no act, but only an intent, and that, to use the words of counsel for the appellant, "the general principle of our penal code is to punish the act and not the intent". What was charged there was that the defendant had solicited a servant to steal his master's goods and it was said, in view of the fact that the servant did not steal the goods or do any other act except the soliciting and inciting, that was no offence known to the law. Lord Kenyon, C.J., and the other members of the Court dealt with that question, but in the course of the judgment given by Lawrence, J., the learned Judge, having stated the objections to the indictments, said (at p. 21): "Secondly, all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable." Those words have been treated as a good authority for saying that offences which tend to the prejudice or which cause expense to the public justify charges under the common law of misdemeanour of causing a public mischief.

The first case which I need refer to as justifying the statement I have just made is BRAILSFORD, [1905] 2 K. B. 730. There the two defendants were indicted for conspiracy, the conspiracy being that they had "unlawfully conspired to obtain a passport in the name of one of the defendants from the Foreign Secretary by falsely pretending and representing that the said defendant desired to use the passport himself while travelling in Russia with intent that the passport should be used by another person in the name of the said defendant", and that was said to be to the public mischief of the subjects of the King. In the charge to the jury the learned

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Judge directed them as a matter of law that the acts alleged, if proved, tended to produce a public mischief and that proof of the acts would establish that the defendants had committed the offence charged in the indictment. On a motion in arrest of judgment, the Lord Chief Justice (Lord Alverstone), Lawrance and Ridley, JJ., upheld the conviction, and in the course of the judgment of the Court, which was given by the Lord Chief Justice, this passage occurs (at p. 745): "It is not necessary to do more than to remember certain incidents in the nineteenth century to see what grave international questions might arise in the event of a person holding a passport receiving ill-treatment in a foreign country. It cannot, of course, be maintained that every fraud and cheat constitutes an offence against the criminal law, but the distinction between acts which are merely improper or immoral and those which tend to produce a public mischief has long been recognised. The cases cited by the learned Attorney-General, HIGGINS (*supra*), WHEATLY (1761), 2 Burr. 1125, YOUNG (1789), 3 T. R. 98, are authorities for this view." The learned Lord Chief Justice goes on to say that these authorities are supported by the reasoning in other judgments of the Court. He also said this (at p. 747): "We are of opinion that it is for the Court to direct the jury as to whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given. Assuming the matter to relate to the issue of a public document by a public department of State and it is obtained by false representation for an improper purpose, *i.e.*, for use by a different person passing off as the *bona fide* holder, we are of opinion that it is injurious to the public and tends to bring about a public mischief. It is scarcely necessary to cite authority, but we would call attention to the reasoning of Lord Mansfield in VAUGHAN", (1769) 4 Burr. 2495, at p. 2499. That case was one in which the Duke of Gloucester was granted an information against the defendant who had sought to give him some pecuniary consideration for obtaining an office for him. I have read those passages as showing that in 1905 it was held that

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HIGGINS (*supra*) was authority for a charge of public mischief on the facts of such a case as BRAILSFORD (*supra.*) Two years later a case of a different character led to a similar charge, namely, PORTER, 3 Cr. App. R. 237; [1910] 1 K. B. 369. The headnote in the Law Reports is as follows: "An agreement by an accused person to indemnify his bail is illegal in that it tends to produce a public mischief, and the parties to the agreement are, therefore, guilty of the offence of conspiracy, although they may have entered into the agreement without any wrongful intent." This case was before the Court of Criminal Appeal (Lord Alverstone, Darling, and Phillimore, JJ.). Lord Alverstone, in giving the judgment of the Court, said (3 Cr. App. R., at p. 244; [1910] 1 K. B., at p. 372): "It has been clearly established by a series of authorities that an agreement to indemnify bail is one which cannot be enforced . . . But that is not enough to dispose of the question in this case, for there are many contracts which, though not enforceable, are not contracts so unlawful as to render them the subject of an indictment for conspiracy. This question was very fully discussed in BRAILSFORD (*supra*), and I there pointed out (at p. 739) that 'it cannot, of course, be maintained that every fraud and cheat constitutes an offence against the criminal law, but the distinction between acts which are merely improper or immoral and those which tend to produce a public mischief has long been recognised'", and the Lord Chief Justice quotes later passages from his judgment in that case, which I have already read.

The last of the cases to which I need refer as showing that this offence is embodied in our law is MANLEY, 24 Cr. App. R. 25; [1933] 1 K. B. 529. The headnote in the Law Reports is: "Conduct causing or tending to cause public mischief constitutes a misdemeanour at common law. Where a person makes a false statement to the effect that he has been robbed by a man of a given description, thereby leading officers of the police to waste their time and exposing individuals of that description to suspicion, he commits the misdemeanour of causing a public mischief." I need not read the judgment of

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the Lord Chief Justice, Lord Hewart, in that case. He, too, bases his view of the law upon the statement made by Lawrence, J., in HIGGINS (*supra*), the precise words of which I will read once more: "All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable."

I have referred to these authorities, some of which are quite recent and familiar, because it has been suggested that this is the first time in which a neglect of duty has been treated as material upon which a Judge could rule that a public mischief in the circumstances of the case was indictable. It is obvious that this is a class of offence which can be extended very widely, and indeed almost indefinitely, if the language of Lawrence, J., is applied, or if the statements which are to be found in modern text-books are applicable. For instance, in *Halsbury's Laws of England*, 2nd (Hailsham) edition, Vol. IX, page 426, this plain statement is to be found: "Any person who commits an act tending to effect a public mischief is at common law guilty of a misdemeanour", for which HIGGINS (*supra*) is cited; "such an act may be any act tending to the prejudice of the community", and again HIGGINS (*supra*) is referred to, and the language of Lawrence, J., being slightly different from the more modern language in which the phrase "effecting or causing a public mischief" occurs.

We do not think it necessary or indeed desirable to attempt to define the cases which may be within the language which has been used by Lawrence, J., and other learned Judges. The only question we have to consider on this part of the appeal is whether the learned Judge, Cassels, J., was wrong in his ruling that if the jury found certain facts exist those facts amounted to a public mischief. We have come to the conclusion, after hearing learned counsel, that the learned Judge's ruling cannot be disturbed on this point. It is obvious that in plain words a great public mischief was caused. The parts of these shelters which were "duds" and

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"shoddy", to use the learned Judge's expressions, were erected in consequence of the neglect of his duty or partly in consequence of the neglect of his duty by the appellant, and whether the words used by Lawrence, J., in HIGGINS (*supra*) are taken, or whether the words which are now commonly used are taken, we think that the learned Judge was giving a ruling which it is impossible to disturb.

[After dealing with complaints of alleged misdirection, the learned Lord Chief Justice continued:] There is only one other matter about which I need say a word. We heard considerable argument from counsel for the appellant, who has done everything which he could possibly do on behalf of his client, on the absence of any intention or guilty mind. To use the Latin phrase that constantly comes up on the question of intention, it is said that he had no *mens rea*. All it is necessary to say on this point is that if there was an agreement to do an unlawful act—which was for the jury to find—that makes it unnecessary to consider further whether there was any guilty intention. It must be taken to be the law that to effect or cause a public mischief is a misdemeanour and if there was an agreement, which the jury might infer from all the circumstances, to commit this unlawful act, that makes it unnecessary to consider any question about the existence of a guilty intention. We have not overlooked the fact, in so far as it is material, that the appellant is a man of very good character and that he might have persuaded the jury by his counsel that he was not to blame in the acts of omission which are charged against him, but the jury have taken another view, and they must be taken by their verdict to have found that the appellant was guilty of acts of omission and of an act which is more than an act of omission, an act of commission in making satisfactory reports when, as he himself says, he had not the time to give attention to his duties. But the defence which he says he had, and which he was unable to persuade the jury to accept, does not affect the view which we take upon the legal arguments which have been presented

to us in Court for our consideration. In all these circumstances we think that the verdict of the jury cannot be disturbed.

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Appeal dismissed.

Solicitors—Gilbert Samuel & Co., for appellant.

CIRCUIT CASE (WESTERN CIRCUIT). DORSET SUMMER ASSIZES.

BEFORE

MR. JUSTICE LAWRENCE.

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Coroner's Inquisition—Motion to Quash—Irregularity in Proceedings Leading up to Committal.

Coroner's inquisition quashed on motion at Assizes on the ground (*inter alia*) of irregularity in the proceedings leading up to committal.

The defendant appeared at Dorset Assizes on May 24, 1944, to answer a coroner's inquisition charging her with the manslaughter of a child, born in a maternity home of which the defendant was matron. There was no committal by the justices.

J. Scott Henderson, for the defendant:

The power of the High Court to quash an inquisition is the same as the power of the Court to quash an indictment. If there has been no proper foundation for the preferring of an indictment, the Court will quash it, even though it is not demurrable. [He referred to HEANE (1864), 33

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L. J. M. C. 115, and GEE, 25 Cr. App. R. 198; [1936] 2 K. B. 442. The quashing of an inquisition or indictment at Assizes otherwise than on demurrer is unusual, but there can be no doubt about the right of the Court to quash if the committal is irregular or without jurisdiction. The present inquisition should be quashed on three grounds. In the first place, the coroner should have accepted the first, second, and third verdicts of the jury which did not find criminal negligence. It was improper to make the jury reconsider their verdict until there was a sufficient majority in favour of a finding of criminal negligence which would justify a committal. Secondly, there was no evidence justifying a finding of criminal negligence. Thirdly, there was an irregularity in the proceedings leading up to committal, in that the coroner on two occasions had private conversations with an individual member of the jury. This must vitiate the committal: WOOD, [1928] 1 K. B. 302, and DIVINE, [1930] 2 K. B. 29.

W. Maitland Walker, for the Crown:

There is no jurisdiction in the High Court to quash an inquisition in these circumstances, at any rate without the fiat of the Attorney-General.

LAWRENCE J.: This is a motion to quash a coroner's inquisition upon which the accused person, Prudence May Reynolds, would be tried if the inquisition were presented. It is contended on behalf of the Crown that there is no jurisdiction in the High Court to quash such an inquisition, at any rate without the fiat of the Attorney-General. Upon the question of jurisdiction it is contended on behalf of the defendant that an inquisition stands on exactly the same footing as an indictment, and that the High Court has jurisdiction to quash an indictment if evidence is produced upon affidavit that the procedure leading up to the indictment was an improper form of procedure. On the authority of the cases which have been cited to me: HEANE (1864), 33 L. J. M. C. 115, GEE AND OTHERS, 25 Cr. App. R. 198; [1936] 2 K. B

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442, I am of the opinion that I have jurisdiction at common law to quash an inquisition in the same way as the Court has jurisdiction to quash an indictment.

GEE AND OTHERS (*supra*) was a case where in the preliminary investigation before the committing justices the procedure laid down by statute had not been properly complied with. In that case the Court of Criminal Appeal overruled the Recorder who had, in the first place, refused to quash the indictment himself, and had adjourned the case in order that an application to the Divisional Court might be made for the indictment to be quashed. When the case subsequently came before him, no such application to the Divisional Court having been made, he refused to quash the indictment himself on the ground that he had no jurisdiction to do so. But the Court of Criminal Appeal held that the learned Recorder was wrong, and therefore it was clearly decided by the Court of Criminal Appeal that in such a case as that, where the procedure laid down to be followed before the committing justices had been disregarded, the indictment which proceeded upon that basis ought to be quashed by the Court before whom it was brought. I therefore hold that I have jurisdiction at common law, and without the fiat of the Attorney-General under the Coroners Act, to quash a coroner's inquisition.

The grounds upon which I am asked to quash this inquisition are, first, that the coroner ought to have accepted the first verdict brought in by the jury. The joint affidavit of Mr. Marshall Harvey and Mr. Dalton is relied upon by the defendant, and the affidavit of Mr. Miller, the coroner, in reply shows that that affidavit, as far as the facts are concerned, is extremely accurate. I should not be prepared to quash the inquisition upon this ground if it stood alone. I think it appears that the coroner, considering that the jury's verdict was ambiguous, was only seeking to elucidate that verdict and to obtain from the jury a clear finding upon the material question which was before them. I do, however,

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think that when the foreman said that the jury were not unanimous but had decided that there was some degree of negligence with regard to warmth and general supervision and that this was contributory to the death of the child, the coroner was in error in saying that such a decision amounted to criminal negligence. But that error did not go to the root of the matter. The jury were properly directed as to criminal negligence and ultimately did return a majority verdict of five to two that there had been criminal negligence. Therefore I should not be prepared to quash the inquisition if that matter stood alone.

Nor should I be prepared to quash the inquisition upon the second ground which is advanced on behalf of the accused person, namely, that there was no evidence to justify the jury's finding. The evidence has not been gone into completely before me, but, from the fact of which I have been informed, that the prosecution in this case do not propose to offer any evidence against the accused person, it is highly probable, at any rate, that the evidence was of a very slender nature. But, in so far as my attention has been drawn to the evidence before the coroner, I am not prepared to quash the inquisition upon that ground standing alone.

The last ground upon which it is contended that the inquisition ought to be quashed is that there were irregularities in connection with the proceedings which, when taken together with the mode of obtaining the verdict of the jury and the slender nature of the evidence, make it right in the interests of the administration of justice that the inquisition should be quashed. The principal points are that it is alleged by the foreman of the jury that the coroner had two conversations with him which were, in substance, private conversations which took place between him and the coroner, and not between the coroner and the whole jury. The coroner entirely denies that the second conversation referred to took place, and I proceed upon the footing that what the coroner says is accurate, and that the foreman of the jury must have been mistaken in what he thought the coroner said. But it does

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appear that these two conversations did take place in circumstances which, I think, were undesirable; that is to say, that they were observations made by the coroner to a single member of the jury. It also appears from the evidence before me that the coroner—or, rather, his firm—had had correspondence with regard to legal proceedings against the accused woman.

It is clear from the cases which have been cited to me—WOOD, [1928] 1 K. B. 302, and DEVINE, [1930] 2 K. B. 29—that where a coroner has been quite innocently guilty of conduct which is considered improper—for instance where the coroner had, as in the case of WOOD (*supra*), gone with the jury into the room where they retired to consider their verdict—that would invalidate the inquisition, although it is not suggested that the coroner had intended to do anything which was improper or that he had said anything which he ought not to have said. It was merely the fact that he had gone into a room which ought to have been private to the jury and discussed the case there with them. Similarly, in the case of DEVINE (*supra*), where the coroner had shown one of the jurymen before the hearing of the inquest one of the exhibits which was produced at the hearing, there too it was held that such conduct as that would invalidate the inquisition. The general principle was adhered to that it is hardly more important that justice should be done than that it should appear to be done.

In the present case I think that, having regard to the fact that the coroner's firm had undertaken correspondence with regard to legal proceedings in the course of their practice against the accused woman, it was undesirable that he should have conducted the inquest, and I think it was undesirable that he should have had conversations with any member of the jury alone, which might at least appear to be private conversations.

Having regard to the whole of the facts of the case, the erroneous observations of the coroner as to the effect of one

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of the jury's intermediate findings, the slender nature of the evidence, and the last matter I have referred to, I think this inquisition must be quashed.

Inquisition quashed.

Solicitors: E. W. Marshall Harvey and Dalton, Bournemouth, for the defendant; C. P. Brutton, Dorchester, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE OLIVER AND MR. JUSTICE BIRKETT.

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Witchcraft—Conjuration—Not Limited to Pretence to Hold Conversation with Evil or Wicked Spirits—Witchcraft Act, 1735 (9 *Geo.* 2, *c.* 5), *s.* 4.

By section 4 of the Witchcraft Act, 1735: "And for the more effectual preventing and punishing any pretences to such acts or powers . . . whereby ignorant persons are frequently deluded and defrauded . . . if any person shall . . . pretend to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration", he shall be exposed to penalties.

The aim of the above section was that ignorant persons should not be deluded or defrauded by the pretence to exercise or use any kind of conjuration, and the "conjuration" referred to in the section is not limited to a pretence to hold conversation with evil or wicked spirits.

Appeals against conviction, and in the case of the first appellant against sentence also.

The appellants were convicted at the Central Criminal Court on April 3, 1944, after a trial lasting eight days, of

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conspiracy to contravene the provisions of section 4 of the Witchcraft Act, 1735. The particulars of offence alleged that the four appellants " conspired together and with other persons unknown to pretend to exercise or use a kind of conjuration, to wit, that through the agency of the said Victoria Helen Duncan spirits of deceased persons should appear to be present in fact in such place as the said Victoria Helen Duncan then was in and that the said spirits were communicating with living persons then and there present ".

The appellant Duncan was a professional medium, who was engaged at a substantial fee to give a series of séances in a registered church or temple, as it was called, at 30 Copnor Road, Portsmouth, maintained by the appellant Homer over a chemist's shop which he had kept for many years. The appellant Jones, known as Mrs. Homer, lived with him, and had done so for some twenty-five years. The appellant Brown assisted Duncan and acted as her booking agent. The evidence for the prosecution was concerned with dates in December, 1943, and January, 1944, but principally with two dates, January 14 and January 19. Evidence was given for the prosecution of the happenings on these dates at the church, and of the parts played by the appellants. After certain preliminaries, Duncan dressed in black was seated in a chair behind a curtain in a corner of the room. Homer and Jones sat near the front. The light was dim, being confined to a single red lamp at the back of the room. Duncan produced her spirit guide, who was called Albert, and he would say that he had a message for a person in a particular chair. Then when the person indicated called out, there would appear in the dim light a form of someone who claimed to be a friend or relative of one of those present. In some cases the material form was said to be that of an animal, such as a parrot or cat.

The case for the prosecution was that the whole performance was an elaborate pretence, a fraudulent performance, a mere imposition on human credulity. This was sought to be established by evidence of messages going to the wrong seat owing to a change of occupant taking place by a

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mistake unknown to any of the appellants; to messages purporting to come from relatives who had never existed; to the attempted seizure by a witness of a substance said to be ectoplasm emanating from Duncan, but which felt like cheese-cloth, and which did not return to her as ectoplasm from a materialisation medium was said to do, but was caught away by someone among the congregation; to the fact that on one important occasion (January 19) Duncan was said not to be seated in the chair behind the curtain, but to be standing between the curtain pushing a piece of white cloth down her front to the ground, a cloth which appeared to be a very flimsy substance like "butter muslin"; that on the same occasion when the lights were afterwards turned on, Duncan was found to be stooping down putting on her shoes, as though for some purpose she had been barefooted at some time during the sitting.

C. E. Loseby, and *T. Simpson Pedler*, for the appellants: The Recorder should have directed the jury that only a pretence to hold conversation with wicked and evil spirits constituted an offence under the Witchcraft Act, 1735. "Conjuration" had by that time become a recognised term in law and its meaning had become well defined as referring only to traffic with evil spirits. [He referred to Cowell's *Interpreter* (1672); Coke's *Institutes*, Part III, p. 45; Hawkins' *Pleas of the Crown* (Vol. I, p. 356).] It must be assumed, therefore, that the statute of 1735 was not using the word in any sense different from that which at the time had become well recognised in law. [The other grounds of the argument for the appellants are referred to in the judgment.]

John Maude, *K.C.*, and *Henry Elam*, for the Crown: There is no ground for limiting the meaning of the phrase "any kind of conjuration" in section 4 of the Act of 1735 in the way suggested on behalf of the appellants. Before 1735 "conjuration" may well have been confined to traffic with evil spirits, but it is significant that the statute 1 Jac. 1, c. 12 used the phrase "conjuration of evil and wicked spirits", and

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that the Witchcraft Act, 1735, after repealing the statute of James, used the phrase " any kind of conjuration " *simpliciter*, without any reference to evil or wicked spirits. This is a clear indication that " conjuration " in this Act is to be interpreted in a wider sense than in earlier statutes, and that a pretence to hold conversation with the spirits of deceased persons comes within its ambit.

Cur. adv. vult.

June 19.—THE LORD CHIEF JUSTICE (after stating the facts): It is clear from the aforementioned short recital of the facts, which is not intended to be complete or exhaustive, that there was evidence for the jury, which, if believed, would be evidence of a pretence that so-called materialisations which were in fact produced by means of fraudulent devices and apparatus were of a different nature altogether. Homer, alone of the appellants, gave evidence, and forty-four other witnesses gave evidence for the defence. The witnesses for the defence who were present on the material dates, particularly January 14 and 19, gave evidence denying that there were any elements of pretence or deception. The evidence was given in great detail on all the matters alleged by the prosecution to be fraudulent or indeed suspicious. The jury had before them, therefore, in great fullness the evidence on both sides as to the facts, and had before them with equal fullness the submissions of counsel upon these facts. In addition to the witnesses called for the defence who were present at the sittings which were made the subject of the indictment, the defence called no less than twenty-six witnesses who were not present, but who gave evidence about Mrs. Duncan's performances as a medium over a long period of years, expressing their belief in her genuineness and informing the jury of the mysteries of the spirit world, the nature of ectoplasm, and a variety of matters of that kind.

We find it a little difficult to see on what principle that evidence was admitted in this case. The relevant period was the period covered by the indictment. The relevant inquiry

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was whether the appellants had conspired, as alleged on these dates, to pass off a sham on their audience, and whether the appellant Duncan had taken part in the alleged conspiracy. To examine what took place on other occasions scarcely seems relevant to the charge. The learned Recorder no doubt was anxious that in an unusual case some latitude should be given, and permitted the evidence to be called, but had he excluded it, we do not think complaint could properly have been made. Indeed, we think it would have been rightly excluded. In the course of the eight days of the trial at the Central Criminal Court, all the evidence given by witnesses, who were subjected to detailed cross-examination, and explained at considerable length by counsel, was before the jury; and the jury convicted the appellants on count 1 in the indictment, the only count on which the trial had proceeded.

The appellants appeal to this Court on several grounds, some of which can be dealt with quite shortly before dealing with what was regarded by counsel for the defence as his only point of law and as his most important ground, namely, the submission as to the Witchcraft Act, 1735, and the meaning to be attributed in law to the term "conjuration". This submission was contained in the first three grounds of appeal. The three grounds are virtually one, and I will deal with them after disposing of the other grounds first. Ground 4 is a complaint that the learned Recorder wrongly rejected evidence by the appellant Duncan purporting to demonstrate and prove that at all material times she was a materialisation medium and to disprove the allegations made against her. In the course of the argument in this Court the learned counsel for the appellants conceded that it was a matter for the discretion of the learned Recorder whether to allow such a demonstration to be given or not. The difficulty of arranging such a demonstration satisfactory in all its detail to both sides is obvious. To mention only one matter: if in the course of the demonstration ectoplasm was to be alleged to emanate from the medium, would the jury be allowed to handle it, or to do anything to verify the appearance? Or would the jury

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have to be content with what they could see in a dim light such as was provided on the occasions in question? A host of similar difficulties can be seen both from the point of view of the prosecution and of the defence. It seems clear to us that no such demonstration, even if the circumstances in which it should take place could be agreed, and whatever it purported to show, could be conclusive on the only issue which the jury had to try, and indeed might well confuse the jury, or operate to the great disadvantage of the appellants. We think the learned Recorder exercised his discretion wisely in this case, and we may add that he was fortified in what he did by the answer of the jury to the question he asked them as to whether they wished to see such a demonstration. No reasonable ground of complaint can be sustained on this point.

Ground 5 is in reality the same ground of complaint as appears in ground 4, though expressed in a different form. It is that the learned Recorder wrongly rejected evidence of an examination by expert witnesses on March 15, 1944, to prove that the appellant Duncan was a genuine materialisation medium. We think this evidence was rightly excluded as being irrelevant to the issue before the jury, which was confined in point of date to December, 1943, and January, 1944; an examination by expert witnesses in March, 1944, could not assist to determine the truth of the facts alleged to exist upon another date. If it was right to exclude the proffered evidence of a demonstration before the jury, it follows that the evidence of what took place on March 15, 1944, in the absence of the jury, was likewise properly excluded.

Ground 6 is a complaint of the learned Recorder's direction to the jury on the law and on the facts. Particulars are set out in the notices of appeal. The main complaint is that the defence was not adequately placed before the jury. At every stage of the eight days' trial the main issue, or indeed the only issue of fact in the case, was before the jury in almost every word that was said either by the witnesses or by counsel. The prosecution alleged that it was all a sham, the defence asserted with a wealth of witnesses that everything was completely

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genuine. The learned Recorder could not be expected to repeat the evidence of eight days, but he did review before the jury the main points of the evidence, and told the jury what was the question they had to decide. We think he succeeded within reasonable limits of time in reminding the jury of the evidence that had been given for the defence. It would be unreasonable to expect the learned Recorder to comment on each piece of evidence, and indeed it was not necessary when the essential matter to which all the evidence was directed was so plainly before the jury from the first moment to the last. For a criticism of this kind to succeed, the appellant must show that the misdirection of the presiding Judge was such, and the circumstances of the case were such, that it is reasonably probable that the jury would not have returned their verdict had there been no misdirection, and the burden of establishing this is upon the appellant. It is really impossible to say there was any such misdirection here. The case for the appellant had been laid before the jury with great fullness by the learned counsel for the defence, and the details of the evidence most forcibly presented, and it was not necessary that it should all be rehearsed again by the learned Recorder. It was enough if the issue was properly presented and if the jury were directed on the evidence relating to that issue. We find that that was done in this case, and this ground of appeal also fails.

A further ground of appeal was taken before us that the learned Recorder wrongly admitted evidence of a previous conviction of the appellant Duncan. This was included in the original notice of appeal, though it was omitted from the amended notice of appeal. But such a contention is quite hopeless. Twenty-six witnesses at least were called especially to prove that the appellant Duncan was a materialisation medium of standing and repute. It was suggested that if, as was said to be the case, the word "genuine" was omitted from every question coming from the defence relating to the materialisation medium, the prosecution would be debarred from proving the previous conviction for fraud as a medium

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so as to show that her record was not so blameless as was suggested. Such a contention could not possibly be accepted. The evidence was most plainly admissible and proper, in order that the jury might be informed not only of part of the facts, but of the whole of them. This ground of appeals also fails.

Further grounds of appeal were that the learned Recorder refused to allow counsel for the defence to call the appellants or not to call them at any time at the discretion of counsel for the defence, that there was no evidence to found the conviction, that the verdict of the jury was against the weight of evidence, that the verdict of the jury was unreasonable and perverse, and that the trial was unsatisfactory and that there was a miscarriage of justice. We cannot find anything of substance in any of these contentions. The learned Recorder ruled that the ordinary procedure in calling witnesses should be followed, and that there were no circumstances which made any special procedure necessary, but, however this may be, the Recorder certainly did not prevent counsel for the defence from calling the appellants or any of them. One of the appellants, Homer, was in fact called, and if it had been desired all or any of the other appellants could certainly have been called. There was abundant evidence on which the jury could convict if they were so minded, and it is quite impossible to say the verdict was against the weight of the evidence, or that the verdict of the jury was unreasonable or perverse. The decision on the evidence was for the jury, and there is no substance in the submission that the trial was unsatisfactory or that there was a miscarriage of justice. The trial was certainly unusual in its form, but if there was anything unsatisfactory about it, it was rather in the great latitude accorded to the defence in the conduct of the case, and the reception of evidence which on a strict view of the law of evidence should have been excluded.

There remains for consideration the point taken in the first three grounds of appeal, that there was no evidence of any acts by the appellants constituting an offence under the Witch-

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craft Act, 1735, and that the learned Recorder wrongly directed the jury that a pretence to hold conversation with spirits of deceased persons constituted an offence under that Act. The argument was that the proper direction would have been to tell the jury that only a pretence to hold conversation with wicked and evil spirits was forbidden by section 4 of the Act of 1735. In the course of an interesting and elaborate argument, Mr. Loseby cited the authorities who had written on the word "conjuration" before 1735, and quoted from some of the dictionaries published after 1735. The conspiracy of which the appellants were found guilty was a conspiracy to contravene section 4 of the Witchcraft Act, 1735, and the material words in count 1 of the indictment were: "To pretend to exercise or use a kind of conjuration, to wit, that through the agency of the said Helen Duncan spirits of deceased persons should appear to be present in fact in such place as the said Helen Duncan then was in, and that the said spirits were communicating with living persons then and there present." "Pretend to exercise or use any kind of conjuration" are the words of the statute 9 Geo. 2, c. 5, s. 4, and it is important to look at the history of this matter. I may begin with the statute 33 Hen. 8, c. 8, which uses the words "conjuration of spirits" with no reference to evil spirits at all. That Act was repealed by a statute of Edward VI, which in turn was followed by the statute 5 Eliz. c. 16. This last statute, before speaking of the repeal of the statute of 33 Henry VIII by the statute 1 Edw. 6, c. 12, speaks of "the wicked offences of conjurations and invocations of evil spirits" which were made felonies by the statute of Henry, whereas the words "evil spirits" do not occur in the statute of Henry VIII at all. That statute merely speaks of the practice of "invocations and conjurations of spirits". The next statute dealing with this matter was the statute 1 Jac. 1, c. 12, which speaks of the "conjuration of evil and wicked spirits". The statute was a characteristic example of the attitude of James I to this practice. Finally, the statute 9 Geo. 2, c. 5, s. 4, after repealing the statute of James, speaks of "conjuration" with-

out reference to spirits, or evil and wicked spirits, but simply "any kind of conjuration".

Now the point submitted by Mr. Loseby is that the word "conjuration" in the statute of George II has only one meaning, and that meaning has been well defined and crystallised in law. He says it bears the meaning in the language of Cowell's *Interpreter* (a publication of 1672) as contained in the following passage: "It is especially used for such as have personal conference with the Devil or Evil Spirits". He cited from the third part of Coke's *Institutes*, Hawkins' *Pleas of the Crown* and many dictionaries, but the definition I have quoted contains the main point of his submission. We must be allowed to doubt whether Cowell's *Interpreter* possesses the authority claimed for it by Mr. Loseby, and we certainly do not think that this meaning or interpretation is to be given to the words "any kind of conjuration" in 9 Geo. 2, c. 5; indeed, the express alteration from the statute of James I which is being repealed, and the use of the words "any kind of conjuration" without reference to spirits, evil or otherwise, would seem to indicate the contrary.

In the sixteenth and seventeenth centuries the word "conjuration" was commonly used with reference to traffic with spirits. In those centuries the minds of men were greatly concerned with the evils which they believed arose from such conference, and as a result of the teaching of the Church, based possibly upon passages in the Bible, all such spirits were regarded as and were apt to be described as evil spirits. Conjuration of these evil spirits was an offence, it was said, against God and religion and was usually linked with witchcraft, enchantment, invocation and sorcery, the punishment for which, as for heresy, was burning in early times. But "conjuration" was not a word which was to be taken to mean only "conjuration of evil and wicked spirits". That was an express meaning given to it by the inclusion of the words in the statutes where such words appear. The *Oxford English Dictionary* gives examples of its use in different ages right down to modern times. Coke's *Institutes*, third part, associate

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the word " conjuration " with invocation and seem to suggest that the two words have the same meaning. The learned author quotes the case of King Saul from the First Book of Chronicles: " So Saul died for his transgression and also for asking counsel of one that had a familiar spirit to inquire of it and inquired not of the Lord ".

We do not think that the words " any kind of conjuration " in the statute 9 Geo. 2, c. 5 can be limited in the way Mr. Loseby suggests. In the first place it is to be observed that the offence described in the statute is the pretence to exercise or use " any kind of conjuration ". Secondly, it appears plain that with the abolition of the felonies of witchcraft, sorcery, enchantment or conjuration the minds of men were making an advance. These things were no longer believed in, but the statute of George II did not go the length of allowing anyone to make the pretence of engaging in converse with spirits, not being evil spirits. Such a distinction would raise an issue of fact incapable of determination.

In our judgment, the words of the section with which we are concerned in this case are all-important. What was aimed at, as shown by the language of the statute itself, was that ignorant persons should not be deluded or defrauded by the *pretence* to exercise or use any kind of conjuration. The reference to " evil spirits " is omitted, and the words " any kind of " were added, and in our opinion these words are wide enough to cover the conspiracy alleged, which the jury have found to be proved in this case.

It was repeatedly emphasised at the trial by the learned Recorder, and must be emphasised here again, that the only matter to be decided by the jury was whether there was a pretence or not. The prosecution did not seek to prove that spirits of deceased persons could not be called forth or materialised or embodied in a particular form. Their task was much more limited and prosaic; it was to prove, if they could, that the appellants had been guilty of conspiring to pretend that they could do these things, and therefore of conspiring to pretend that they could exercise a kind of conjuration to do

these things. That was the case made by the prosecution to the jury, and the jury must be taken to have accepted the evidence for the prosecution when they found the appellants guilty of the conspiracy charged.

We think that all these appeals against conviction should be dismissed. The application of the appellant Duncan for leave to appeal against sentence should also be dismissed. On the footing of the verdict of the jury, nine months' imprisonment was, in our opinion, in no way excessive. We think that the sentence should count as from the date of conviction, as there was a real point of law to be argued.

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Appeals dismissed.

Solicitors: G. A. Elkin, for appellants.

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False Pretences—Summing-Up—No Reference to Intent to Defraud—Questions to be put by Counsel for Prosecution.

On a charge of obtaining property by false pretences, counsel for the prosecution should ask the person alleged to have been defrauded: "Why did you part with your money (or property)?"; or at least, "Did you believe what the prisoner told you?"

Conviction quashed in a case where the above-mentioned questions had not been asked on the ground (*inter alia*) that there was no evidence that the alleged false pretence operated on the mind of the prosecutor.

Appeal against conviction and application for leave to appeal against sentence.

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The appellant was convicted at Hampshire Quarter Sessions on April 6, 1944, and was sentenced by the Chairman to five years' penal servitude.

At the trial counsel for the prosecution asked the person who was alleged to have been defrauded what she had been told by the appellant, but omitted to ask her whether she believed what she had been told or why she parted with her money. Further, the summing-up contained no reference to intent to defraud, and contained certain misstatements of fact.

G. L. Hardy, for the appellant:

The summing-up was unsatisfactory in a number of respects. The Chairman purported to explain to the jury the ingredients of the offence of obtaining money by false pretences, but made no reference whatever to intent to defraud. Further, the prosecutrix had never stated in her evidence at the trial what the inducement was which led her to part with her money, but the Chairman appears to have confused her evidence as it appeared on the depositions with her evidence given at the trial, and misdirected the jury on the facts.

W. J. M. Dennis, for the Crown:

The summing-up certainly cannot be considered satisfactory, but the case was a very clear one, and the Court is asked to consider whether in all the circumstances there can be said to have been any substantial miscarriage of justice.

HUMPHREYS, J.: There are several grounds on any one of which the Court would find it necessary to quash this conviction. One is that the Chairman said to the jury: "Let me explain quite shortly what the offence of false pretences consists of." He then explained in a dozen lines or so, but omitted any reference to the most essential ingredient of the offence, namely, the intent to defraud. From beginning to end of the summing-up there is not a word on that matter, and, according to a number of cases decided in this Court, that in itself would be fatal to the conviction.

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Unfortunately, the learned Chairman was not the only person who forgot what the law was, because counsel for the prosecution—who was not Mr. Dennis who has appeared for the Crown on the appeal—having examined the principal witness, who undoubtedly did part with a substantial amount of money very foolishly, and having asked her details of the various sums with which she had parted, entirely omitted to ask her the all-important question: "Why did you part with your money?" He had elicited from her the fact that she had been told by the appellant that he had been for a considerable time in one of the Ministries. If he had asked the one other question, "Did you believe that?", it might have been sufficient, though a better question would have been "Why did you part with your money?", to which the answer would probably have been, "Because I believed what he told me".

Further, the learned Chairman appears to have become confused in his summing-up between what was probably on the depositions, what was certainly charged in the indictment and what the witness said, because on at least two occasions he told the jury that the evidence of the witness was to a particular effect, whereas in point of fact the witness had said nothing to that effect. The Chairman appears to have assumed that, because a particular statement was charged as a false pretence in the indictment, the witness must have made that statement, when in fact she had not.

The way in which the case was tried was perfectly hopeless, and in the interests of justice there is only one course which this Court can take, and that is to say that the trial was thoroughly unsatisfactory, that the grounds of appeal have been made out, and that the conviction must be quashed.

Conviction quashed.

Solicitors: Marris & Shepherd, for appellant.

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THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS, AND MR. JUSTICE OLIVER.

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Conspiracy—Agreement to do Unlawful Act—Supply of Controlled Goods in Excess of Quota—Proof of Mens Rea not Required.

On a charge of conspiracy to contravene any of the Limitation of Supplies Orders by agreeing that a registered person shall supply controlled goods in excess of quota, it is not necessary that the prosecution should prove that the accused person knew that the amount of the quota of the supplier had been or would be exceeded. The supply of controlled goods contrary to any of the Orders is an offence irrespective of any knowledge or state of mind on the part of the supplier, and accordingly a charge of conspiracy to contravene any of the Orders does not require proof of *mens rea* on the part of the defendant.

JACOBS AND OTHERS (30 Cr. App. R. 1; [1944] K. B. 417) applied.

Appeals against conviction and sentence.

The appellants were convicted at Leicester City Assizes on January 31, 1944, Sorsky and Bresler of conspiracy to procure the company to oversell its quota contrary to the Limitation of Supplies Orders, the company of supplying controlled goods contrary to the provisions of the Orders, and Bresler also of aiding and abetting that offence, and were sentenced by Charles, J., Sorsky to twelve months' imprisonment, a fine of £1,000, and an order that he should pay one half of the costs of the prosecution; Bresler to twelve months' imprisonment and a fine of £1,000; and the company to a fine of £1,000.

H. Bresler & Sons, Ltd., was a company controlled by Herman Bresler, which dealt in London with clothing and

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similar material. During 1940 much of its stock was destroyed by enemy action, and the company moved to Leicester, where again it suffered loss by bombing, with the result that it was left with no stock of goods. By virtue, however, of its trading during the standard period, the company had the right to deal in goods to an amount of £2,000 in the period covered by the Limitation of Supplies (Miscellaneous) Order, 1940, and to an amount of about £1,500 in the period covered by the Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940. Isaac Sorsky owned a similar business in Leicester, where he traded in the name of Elliot's Provincial Warehouse, Ltd. That company held large stocks of goods, but lacked the necessary quota to enable it to sell to its unregistered customers as it desired. In October, 1940, Bresler and Sorsky met, and agreed that Sorsky should sell to Bresler controlled goods and should then sell as the agent of Bresler those same goods to Sorsky's customers. That agreement was carried out. Sorsky invoiced the goods to Bresler Ltd., and then, as the selling agent of Bresler, re-sold those goods to his customers. Bresler provided Sorsky with blank invoices in his own name, or the name of his company, to be filled in as and when Sorsky delivered consignments of those goods to his customers. They were paid for by the customers by cheques made payable to Bresler, which cheques were dealt with by Sorsky, who cleared them through a bank. From time to time Sorsky remitted sums of money to Bresler as his share of the proceeds, the total amount being a little over £3,000. In this way controlled goods were in fact supplied to unregistered persons in excess of Bresler's quota to the extent of £7,017 in the first period, and £14,912 in the second period.

H. Bresler & Sons were convicted of supplying controlled goods in excess of quota, and Bresler of aiding and abetting that offence. All three appellants were convicted of conspiring to supply controlled goods in contravention of the respective Orders.

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R. T. Paget, for the appellant Sorsky.

H. V. Lloyd-Jones, for the appellants Bresler and H. Bresler & Sons, Ltd.

C. L. Henderson, K.C., and *A. P. Marshall*, for the Crown.

Cur. adv. vult.

July 4. The following judgment was read:—

HUMPHREYS, J.: Those three appeals were heard by this Court and dismissed. We then stated that we would give judgment stating the grounds of the dismissal at a later date, and we now proceed to do so. Oliver, J., who was a member of the Court, agrees with the judgment which I am about to read, which is the judgment of the Court.

The indictment contained four counts: The first count charged the limited company, H. Bresler & Sons, Ltd., that during the period beginning with June 6, 1940, and ending with November 30, 1940, at the City of Leicester, being a registered person within the meaning of the Limitation of Supplies (Miscellaneous) Order, 1940, in relation to a class of controlled goods, to wit, Class 3 in the Schedule to the said Order, it unlawfully did supply a total quantity of that class of controlled goods exceeding in value by the sum of £7,017 two-thirds of the value of the total quantity of that class of controlled goods supplied by H. Bresler & Sons, Ltd., during the period beginning with June 1, 1939, and ending with November 30, 1939. It further charged Herman Bresler, and another person who was acquitted, with aiding and abetting the company to commit that offence. The second count charged a similar offence against the company and against Herman Bresler relating to a different period, at which date a different Order was in force. The third count charged all three appellants, the company, Herman Bresler, and Isaac Sorsky, that they conspired together that H. Bresler & Sons, Ltd., being a registered person, should supply during the period which is referred to in the first count, controlled goods in

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contravention of article 2 of the Limitation of Supplies (Miscellaneous) Order, 1940; and the fourth count charged those same persons with similar offences, with a similar conspiracy, but relating to the second period, at which time the second Order was in force.

The Orders in question were, first, the Limitation of Supplies (Miscellaneous) Order, 1940 (S. R. and O., 1940, No. 874), dated June 6, 1940. By article 1 of that Order it is provided that every person carrying on in the United Kingdom the business of supplying what may be shortly described as any class of controlled goods shall be registered in respect of that class of controlled goods. Article 2 (1) provides as follows: "Except under the authority of a licence granted by the Board of Trade . . . no person who at any time during the period beginning with the 6th day of June, 1940, and ending with the 30th day of November, 1940, is a registered person in relation to any class of controlled goods, shall supply during that period a total quantity of that class of controlled goods exceeding in value two-thirds of the value of the total quantity of that class of controlled goods supplied by him during the period beginning with the 1st day of June, 1939, and ending with the 30th day of November, 1939". The latter period is commonly known as the "standard period". In article 2 (2) the word "supply" in relation to any class of controlled goods is defined as meaning supply in pursuance of a contract of any description otherwise than supply to registered persons in respect of that class of controlled goods. The second Order was the Limitation of Supplies (Miscellaneous) (No. 5) Order (S. R. & O., 1940, No. 1231), dated November 26, 1940. It contains similar provisions, but as the result of article 6, read together with Schedule 1 of the Order, an alteration is made in that the two-thirds referred to in the previous Order in section 2 is altered, and the provision is made that a person may only supply during the period of this second Order an appropriate proportion of the value of the total quantity of controlled goods supplied during the standard period. As regards the class of goods dealt with in this case, which were

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clothing or apparel, fifty per cent. is the amount which was allowed. Paragraph 8 provides that a registered person may by a note or memorandum in writing transfer his right in respect of the quantity of controlled goods in which he is entitled to deal, and that quantity of goods came to be known as the quota, to which a particular registered person had a right. There is a proviso in that last paragraph which provides that no transfer shall have effect unless the consent of the Board of Trade shall previously have been obtained in writing, and a copy of the transfer document is to be supplied to the Board of Trade. The effect, so far as this case was concerned, of those Orders, put very shortly, was that registered persons who are manufacturers or wholesalers are unrestricted in regard to their dealings with each other, but no supply is permitted to be made by a registered person to an unregistered person in excess of the quota held by the supplier.

[His Lordship then stated the facts and continued:] The only question raised on behalf of the company and Herman Bresler in the appeal was whether the aforementioned course of dealing amounted in law to a supplying by Bresler to the unregistered persons. If it did so, it was conceded by their counsel that neither of these appellants had any defence to the charges contained in counts one and two. It was argued that, as the goods physically remained in the custody of Sorsky until they were delivered to the customers, it was Sorsky and not Bresler who supplied the goods. Charles, J., after full argument, held that the course of dealing did amount in law to a supplying by Bresler, and we agree with his ruling. The learned Judge founded himself upon rule 5 of section 18 of the Sale of Goods Act, 1893, which reads as follows: "Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the

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buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made". If, therefore, at the time of the delivery of the goods the property in those goods had already passed to Bresler, Ltd., as the result of the sale to Bresler, Ltd., then in law the goods were sold by Bresler, and it is immaterial whether the delivery was made direct by Bresler, or through an agent. It may well be that, if Sorsky had been charged in counts one and two, he might also have been convicted. We see no reason for holding that to constitute a person a supplier of goods it is essential to prove that he is the vendor, but for the purpose of this case it is sufficient to say that in our opinion H. Bresler & Sons, Ltd., were rightly convicted of supplying, and Herman Bresler of aiding and abetting.

Passing next to counts three and four, upon which all three appellants were convicted, counsel for Sorsky was bold enough to contend that the person supplying in these circumstances could not be convicted of an offence against the Order unless there was proof of a *mens rea* on his part and that a charge of conspiracy to supply contrary to the Order therefore involved knowledge by the accused that the amount of the quota of the supplier had been or would be exceeded. The all-sufficient answer to that argument is to be found in the wording of the Orders in question, which makes it abundantly plain that the supply of controlled goods contrary to the Order is an offence irrespective of any knowledge or state of mind of the supplier. If authority is required in support of that proposition, it will be found in the judgment of this Court in the case of CLAYTON, delivered on February 22, 1943. That case is also an authority for the proposition that conspiracy to contravene the terms of these Orders does not require proof of that knowledge on the part of the accused indicated by the expression *mens rea*. To the same effect is JACOBS AND OTHERS, 30 Cr. App. R. 1; [1944] K. B. 417, in which case it was contended for the appellants (who had been convicted of conspiring to contravene the provisions of the Price of Goods Act, 1939, by selling price-controlled goods at a price in excess

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of the permitted price) that the conviction was wrong in that there was no evidence that the vendors were aware that the permitted price had been exceeded. That argument was rejected by this Court, it being pointed out in the judgment that a criminal conspiracy consists in the agreement to do an unlawful act without reference to the knowledge on the part of the accused of its illegality.

Learned counsel endeavoured to support his argument by reference to the statement to be found in many text-books and said to have originated in Sir Matthew Hale's *Treatise on the Pleas of the Crown* to the effect that it is a good answer to a charge of having committed a misdemeanour at common law to show that the accused acted under the belief in the existence of a state of facts which, if true, would have exonerated him. We are in no way controverting that general proposition of law. If it is to be applied to a charge of conspiracy and to the facts of the present case, it may be said that if there had been evidence upon which a jury could find that the agreement entered into by Sorsky was an agreement to deal only in goods covered by the quota to which Bresler was entitled, it would have been proper to leave that question to the jury, since such an agreement would not have been an agreement to do an unlawful act. On the evidence, however, it is plain that this was not the defence put forward by the only person who gave evidence upon the subject, *viz.*, Sorsky himself. His case was that he sold the goods lawfully to Bresler, having satisfied himself that Bresler was a registered person. Thereafter his view was that the amount of Bresler's quota was a matter for Bresler and the Board of Trade, but did not concern him, Sorsky, as the selling agent of Bresler. A few quotations from his evidence make this abundantly clear. On page 129 of the transcript of the shorthand notes of the trial there is the evidence-in-chief of Sorsky, who was asked by his learned counsel to explain exactly what the agreement was, and he stated it in terms which have already been referred to in this judgment. Then this question was put: "Would you have arranged for the purchase of goods

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unless you had thought Breslers had got quota to use, or that they could sell? Would you have paid £3,200?". The answer was: "I do not think for a moment that the question as to whether Bresler had got quota or not really concerned me. I simply supplied those goods, which I contend I was entitled to do, and I resold them in a perfectly legitimate and legal manner, as it was understood at that time by everybody in the trade. I had not altered my course, or anybody else's course, in the whole procedure at this particular period. Everybody in the trade did the same thing absolutely—they sold on these sort of non-existent quotas that we are aware of to-day". He was then later on cross-examined about that, and on page 135 these questions and answers appear: "(Q) And you were using Bresler's name for what purpose? (A) I was selling for him, and using the invoices on his authority and on his instructions. (Q) You did not examine the books? (A) No, I never saw them. (Q) You were concerned, were you not, before you entered into these transactions, to see that Breslers were registered? (A) Yes. (Q) If you were concerned to see that, you would also be concerned to know what the amount of quota was? (A) Yes. (Q) What steps did you take to verify Bresler's figure as his statement of quota? (A) I will answer that in two ways. (Q) Answer it now? (A) I could have done like everybody else in the trade did, and take no steps at all. But I had asked him what his position was, and I knew he was in a very substantial way of business. I knew he was a Government contractor, and I had every right and every reason to believe he had quota. I believed him honestly and truly. (Q) And you made no independent enquiries at all? (A) I could not make independent enquiries—it was a matter of impossibility to make independent enquiries. (Q) Why did not you ask to see Form Miscellaneous 1?"—I interpolate the statement that that Form is the one which has to be filled up by the registered person and sent to the Board of Trade, stating his previous dealing in controlled goods, which would show the amount of the quota—" (A) That is the Board of Trade's

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business, not mine. (Q) But it was his business? (A) It is for them to call for returns, not me. (Q) Why did you not ask Mr. Bresler to let you know what returns he had made? (A) Why did the Board of Trade put him on the register if he had nothing to do?"—that means he had no quota—" (Q) Never mind about that. Why did not you ask for either Form Miscellaneous 1 or Form Miscellaneous 5? (A) Because I considered myself a good business man. I could not think of every little detail like that; and that is a thing nobody would have thought of—not one business man in a million". In the light of those answers, we think it would have been absurd to leave to the jury the question whether Sorsky had honestly believed in a state of facts of which he said himself: "I did not think about it, it was nothing to do with me at all, it was not my business."

It follows that if Sorsky did act under any mistake at all, it was a mistake of law and not of fact, and ignorance of law affords no excuse. The case, therefore, became, as the learned Judge observed, an undefended one.

We are satisfied that these appellants were rightly convicted. On the question of sentence it is sufficient to say that the Courts are bound to treat breaches of these Orders as serious offences, and the only form of punishment likely to deter such persons as these appellants is a substantial sentence of imprisonment.

The appeals are dismissed.

Appeals dismissed.

Solicitors: Phœnix, Levinson, Walters & Shane, for appellant Sorsky; Maltz, Mitchell & Co., for appellants Bresler and H. Bresler & Sons, Ltd.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS, AND MR. JUSTICE ASQUITH.

THOMAS MICHAEL TREACY.

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Evidence—Prisoner in Custody on Charge of Murder—Answers made by Prisoner after Questioning when in Custody—No Attempt by Prosecution to Tender Document Containing Answers in Evidence—Prisoner Cross-Examined on Contents of Document.

After the appellant had been taken into custody on a charge of murder, a police officer, who stated that he did not know that the appellant was under arrest, arrived at the police station with a warrant for the appellant's arrest on charges of larceny, and put to the appellant a number of questions. These questions and the appellant's answers thereto in his own handwriting were embodied in a written document. The prosecution did not seek to tender this document in evidence, but when the appellant went into the witness-box he was cross-examined on his answers contained in the document.

Held, that the appellant's answers made by him as the result of interrogation when under arrest were inadmissible and should have been entirely removed from the proceedings. The inadmissible document containing them could not be made admissible simply because it was put to the appellant in cross-examination.

Appeal against conviction.

The appellant was convicted at Essex Assizes on June 9, 1944, of murder and was sentenced by Wrottesley, J., to death.

About 1.30 a.m. on March 19 the appellant came to Rochford Police Station and made a statement concerning the death of a girl named Kathleen Cornish. He was told by a police officer that he would be detained on a charge of the murder of that girl. The appellant then received medical attention. About 3 a.m. another police officer, who stated that he did not know that the appellant was under arrest, arrived at the police station with a warrant for the arrest of the appellant on charges of larceny, and put to the appellant, who was unable

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to speak, a number of questions. These questions and the appellant's answers thereto were embodied in a written document. The examining justices held that this document was inadmissible, and the prosecution did not tender it in evidence at the trial. When, however, the appellant went into the witness-box he was cross-examined on his answers contained in that document and an attempt was made to contrast them with certain evidence which he had given in chief.

Cecil R. Havers, K.C., and *J. C. Llewellyn*, for the appellant:

The document which contained the appellant's answers was inadmissible, as those answers were obtained as the result of the interrogation of the appellant when he was already in custody. The document remained, therefore, inadmissible for all purposes and could not be rendered admissible merely because it was put to the appellant in cross-examination.

Sir Charles Doughty, K.C., and *R. H. Blundell* for the Crown:

It is conceded that the document could not have been put in evidence by the prosecution, but once the appellant made statements in the witness-box which were inconsistent with statements made by him contained in the document, it was open to the Crown to cross-examine him on his statements contained in the document, and to put in evidence the document containing them.

HUMPHREYS, J. (in the course of the judgment of the Court quashing the conviction on other grounds which do not call for report): At half past one in the early morning of March 19 the appellant came to Rochford Police Station, and made a communication. Then a doctor was sent for. The appellant obviously required medical attention, and was taken away to the hospital, but before he left for the hospital he was seen by another police officer. The officer told him in terms that he appeared to be the person for whom the police were looking, and that he would be detained on the charge

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of murdering the girl named in the indictment. That happened somewhere about 1.35 a.m. At about 3 a.m. another police officer arrived to tell the appellant that he was going to hold him, if necessary, upon a warrant for charges of larceny. He said that he did not know that the appellant was already under arrest on the charge of murder. In our view, it makes no difference whether he knew or not; the fact was that the appellant was there upon the charge of murder, and the senior officer at that police station ought to have seen that, as the appellant was under arrest upon a charge of murder, no question was put to him about that charge, more particularly in view of the very bad state of health in which he was. In fact, the appellant, who was unable to speak, was cross-examined by this second police officer, who wrote questions, to which the appellant wrote answers, and some of those answers, it was suggested, did not quite tally with the statement which he had made when he first went into the police station.

That document was thought by the prosecution to be of use from their point of view, and they tendered it in evidence at the police court. The magistrates, as we think well advised, came to the conclusion that, seeing that the appellant was at the time when that cross-examination was administered to him in custody on a charge of murder, they ought not to admit that statement. The prosecution apparently accepted that position, and nothing more was heard of that statement until after the case for the prosecution was closed. No attempt was made to persuade the learned Judge to admit it. When, however, the appellant was in the witness box, he was cross-examined by counsel for the Crown upon those answers, and those answers were contrasted with the answers which he had been giving on that day in the witness box in the hearing of the jury.

That statement either was admissible in evidence or it was not. Sir Charles Doughty was disposed to say, frank as he always is, and desirous of being perfectly fair, "I agree; I do not think I could have put that statement in evidence against

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the appellant in the circumstances, seeing that he was in custody on a charge of murder". The statement, therefore, must be taken to be inadmissible. But Sir Charles took the view: "When the appellant had given some evidence in the witness box with regard to his movements on that morning which, in my view, did not agree with the statements which he had made in those inadmissible written answers to questions, I was entitled to put them to him, and to put in evidence the document containing them". We profoundly disagree. In our view, a statement made by a prisoner under arrest is either admissible or not admissible. If it is admissible, the proper course for the prosecution is to prove it, and if the statement is in writing to make it an exhibit, so that everybody knows what it is and everybody can inquire into it and act accordingly. If it is not admissible, nothing more ought to be heard of it. It is a complete mistake to think that a document which is otherwise inadmissible can be made admissible in evidence simply because it is put to an accused person in cross-examination.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS, AND MR. JUSTICE ASQUITH.

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HERBERT WALTON.

Increase of Sentence—Larceny.

Increase of sentence of penal servitude.

Appeal against sentence.

The appellant pleaded guilty at Blackburn Borough Quarter Sessions on April 22, 1944 to three charges of larceny, and asked that seventy-three further cases of a similar nature be taken

into consideration. He was sentenced by the Recorder to three years' penal servitude.

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The appellant in person.
No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant appeals against a sentence of three years' penal servitude, which was passed on him by the Recorder of Blackburn after he had pleaded guilty to an indictment charging him with larceny. There were three counts in the indictment which charged offences of the same nature, thefts of small sums found in boxes in churches.

The appellant is twenty-nine years of age. He should be serving in the Army, but absented himself without leave, and has apparently spent his time in committing offences such as I have described. He asked the Recorder to take into consideration no less than seventy-three cases of this sort. They involved, so far as could be ascertained, sums amounting to £80, of which only £2 has been recovered. He began by committing offences in the nature of bicycle stealing in June 1936. He was fined small sums on two occasions, and then in October 1936 for the fourth of such offences he was sent to prison for a few weeks. In February 1937 he was sentenced to four months for bicycle stealing, six offences being taken into consideration. In February 1938 he began stealing from offertory boxes and, being charged with one such offence, asked that forty-two other offences of the same nature should be taken into account. In January 1939 he committed an offence of housebreaking, for which he received a sentence of nine months' imprisonment. Almost as soon as he came out he began committing thefts of the same nature as before from offertory boxes, and asked that eighty-five similar offences should be taken into consideration. He received the very moderate sentence of twelve months' imprisonment. In October 1940 he committed another offence of that sort and was sentenced to six months. After a conviction for loitering with

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intent, he was convicted of stealing keys of boxes or churches in which the boxes were, and asked that nineteen similar offences should be taken into account. He received six months' imprisonment. In July 1941, somehow or other, he was at liberty and committed more offences. He was convicted of stealing from offertory boxes, and asked that eighty-one similar cases should be taken into account. He then received two years' imprisonment, by far the heaviest sentence passed on him for these repeated offences.

When the whole case is reviewed, it seems to us that, so far from the sentence of three years' penal servitude being excessive, it is not enough. We have the power, exercised on comparatively rare occasions, of increasing a sentence on appeal. The amount of trouble, apart from the actual loss, caused by the appellant, in his persistent robbery of churches and offertory boxes, and the fact that on this occasion he asked that seventy-three of such offences should be taken into account, in addition to the three to which he pleaded guilty, require us to increase the sentence from one of three years' penal servitude to one of four years' penal servitude. He complains in his grounds of appeal that three years' penal servitude is what he calls a "local sentence", which will send him to a local prison. The information which he has received is correct. He says that, if he were to go to a penal settlement, he would have an opportunity of learning a job which he would not have at a local prison. He will now have that opportunity, and, if his professions of reformation are to be relied upon, he may learn a trade which perhaps will be of some use to him when he is released.

Sentenced increased.

CIRCUIT CASE (MIDLAND CIRCUIT). WARWICKSHIRE (BIRMINGHAM) DIVISION SUMMER ASSIZES.

BEFORE

MR. JUSTICE BIRKETT.

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Indictment—Joint Charge of Conspiracy—Committal for Trial—Defendant Called by Prosecution against Co-Defendants on Same Charge before Examining Justices—Second Indictment—No Joint Charge—Defendant Still Untried Called by Prosecution against Defendant Charged with Different Offence—Indictments Quashed.

Five defendants appeared before examining justices on a joint charge of conspiracy to steal and other charges. Three of the defendants were called by the prosecution to give evidence against their co-defendants on the charge in which they themselves were concerned. The justices purported to commit all five for trial. The indictment contained a count charging all the defendants jointly with conspiracy to steal and other counts charging one or more of the defendants with other offences.

Held, that it was not competent for the prosecution to call as witnesses persons who were themselves concerned in the charge on which they were called. Consequently, the committal of all the persons charged was bad and the indictment must be quashed.

On a second indictment, which contained no joint count, three defendants were charged with stealing, and one with receiving. Before the examining justices, where also there had been no joint charge, the defendants charged with stealing had after committal for trial on that charge been called by the prosecution as witnesses against the defendant charged with receiving.

Held, that it was not in accordance with the fair and proper administration of the criminal law that a person charged with

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an offence against whom proceedings were still pending should be called to give evidence of his own offence against another person, although that person was charged with a different offence. The proper course was, therefore, that the second indictment also should be quashed.

Motions before Birkett, J., at Warwickshire (Birmingham Division) Assizes to quash two indictments, on the ground that in each case the purported committal for trial was invalid.

The facts are summarised in the headnote, and appear fully in the judgment.

W. Kelly Carter, for the Crown.
T. Norman Winning, for the defendant Grant.
Guy H. Dixon, for the defendants Peel and Clarkson.
J. H. Moss, for the defendants Ley, Pearce, and Trueman.

BIRKETT, J.: The first indictment charges Grant, Peel, Ley, Pearce, and Trueman with various offences. In the first count they are all charged with the offence of conspiracy to steal, a joint charge concerning them all. In the second charge, Pearce is charged with larceny of certain tea. In the third count, Grant and Peel are charged with receiving certain goods knowing them to be stolen. In the fourth count, Ley, Pearce, and Trueman are charged jointly with stealing. There are in all eleven counts in the indictment, and the application is made that that indictment should be quashed. The ground of the application is that there has been no lawful committal by the justices in the Court below, and, therefore, the bill of indictment which has been preferred and signed, based upon that unlawful committal, is, in fact, a nullity, and there is, indeed, no bill of indictment before the Court and that no trial can take place.

In GEE, BIBBY AND DUNSCOMBE (25 Cr. App. R. 198; [1936] 2 K. B. 442) an application was made to quash the indictment and there were appeals against the conviction. The appellants in that case had been charged with shopbreaking, but before they were committed to quarter sessions the deposi-

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tions, which ought to be taken in accordance with the Indictable Offences Act, 1848, s. 17, had not been taken in conformity with the Act of Parliament. They were, however, committed for trial and were in fact convicted. They appealed to the Court of Criminal Appeal against their convictions, and they took that objection. It was held by the Court that the proceedings before the justices in that case were so defective by reason of the Act of Parliament not having been complied with that there had not been any lawful committal within the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2), which is now the operative statute. Consequently, no bill of indictment could be preferred against the appellants, and the document which purported to be an indictment was not a valid indictment and the appellants could not be tried upon it. In that case, the Court quashed the convictions and made no order in the nature of a *venire de novo* for a further trial. Goddard, J., gave the judgment of the Court of Criminal Appeal, which consisted of the Lord Chief Justice (Lord Hewart), du Parcq, J., and Goddard, J. He read section 17 of the Act of 1848 and then proceeded (25 Cr. App. R. at p. 202; [1936] 2 K. B. at p. 445): "It is common ground that the proceedings before the magistrates in the present case were not in accordance with the above Act. What is the effect of that?" Then he read section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2), which is the relevant statute at the present day and provides as follows: "Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either . . . (a) the person charged has been committed for trial for the offence; or (b) the bill is preferred by the direction or with the consent of a judge of the High Court . . . " Then certain provisions are made, but the essential condition is that the person charged has been committed for trial. Goddard, J., continued: "The question here is whether the persons charged have been legally committed for trial. 'Committed for trial' is defined in the Interpretation Act, 1889, s. 27. 'The expression "committed

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for trial" used in relation to any person shall, unless the contrary intention appears, mean . . . committed to prison with the view of being tried before a judge and jury . . . and shall include a person who is admitted to bail upon a recognizance to appear and take his trial before a judge and jury.' The magistrates purported to commit the appellants for trial by remanding them in custody until trial. It appears to the Court that these proceedings were so defective that there was no lawful committal for trial, and consequently the provisions of section 2 (2) of the Act of 1933 were not complied with and no bill of indictment could be preferred against the appellants. The document purporting to be an indictment which was produced before the Recorder was not an indictment, and the appellants could not be tried on it." Then he referred to some matter in connection with the learned Recorder which does not concern us, and continued: "The result is that there has been what is sometimes called a mis-trial, though it would be more accurate to say that there has been no trial at all." Then he went on to state the powers the Court had to order the trial *de novo*. That was the answer the Court of Criminal Appeal made, quashing the convictions on the ground that there was no lawful committal because the depositions had not been taken in accordance with section 17 of the Act.

In this case, counsel for the prisoner Grant submits upon this indictment, and counsel for the prisoners Ley, Pearce, and Trueman adopts the argument on behalf of his clients, that there has been no lawful committal because of the fact that, when these defendants were all charged in the Court below with conspiracy and other offences, three or four of them were called to give evidence for the prosecution on the charge in which they themselves were concerned. I said yesterday, and repeat, that this is new within my experience, and everybody, and in particular counsel for the prosecution, appears to agree that, in any event, it is most undesirable. The submission of counsel for the defence is that it is illegal and that it renders the committal by the justices a nullity.

In *Taylor on Evidence* (10th ed.), Vol. 2, at p. 964, there

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is a passage which has considerable bearing on this matter: "With regard to the first of these classes of persons, namely, defendants to indictments and persons charged before magistrates with minor offences, the Evidence Act, 1851, in making parties to the record admissible witnesses expressly provided that nothing in this Act 'shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself'. A difficulty arose in the construction of this proviso, in that it did not say that the persons specified in it should not be rendered competent or compellable to give evidence at all, but merely that they should not be allowed or forced to testify for or against themselves. Consequently, where several persons were jointly indicted, it was for some years considered by many judges, though some doubted, that any one of them might . . . be called as a witness either for or against his co-defendants, excepting only in those few cases where the indictment was so framed as to give such person a direct interest in obtaining the discharge of his co-defendants. At last, in 1872, the Court of Crown Cases Reserved, after much discussion, decided that the Evidence Act, 1851, did not alter an ancient law of England, which prohibited any attempt to examine or cross-examine any prisoner on his trial. The indirect effect of that decision was to establish that whenever it is desired to obtain the testimony of a defendant in a criminal trial as against his co-defendants, an end must be put to the proceedings against him, either by his pleading guilty on arraignment, or by the prosecution entering a *nolle prosequi*, or by an application for a verdict of acquittal being made before the case is opened; though the Court, in its discretion, will in ordinary course direct an acquittal either during the progress or at the termination of the inquiry, if no evidence has been given inculpating the party who is sought to be made a witness. Nothing short of a formal judgment or a plea of guilty can, however, be considered as, for this purpose, an end of the matter." The Act

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to amend the law of evidence in 1898 (the Criminal Evidence Act, 1898) enacted for the first time: (Section 1) "Every person charged with an offence, and the wife or husband, as the case may be, of a person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is solely charged or jointly with any other person. Provided as follows: (a) A person so charged shall not be called on as a witness in pursuance of this Act except upon his own application."

In the circumstances of this case Ley, Pearce, and Trueman were called as witnesses for the prosecution although they themselves were then upon that charge. The view which I take is that it was not competent for the prosecution to do that in any event. I take the view, further, that it was quite contrary to the spirit in which the criminal law of this country is administered. So far as the defendants who were called are concerned, counsel for the prosecution says that he could not contend that the committal was otherwise than unlawful, and consequently, he was not prepared to contend that the committal was good as against Grant. Quite apart from those submissions which were made by counsel, I take the view that this is a case in which I ought to exercise my powers, and I do exercise my powers, and I quash the indictment as against Grant, Peel, Ley, and Trueman. That disposes of the first indictment.

With regard to the second indictment, in which similar submissions are made, rather different considerations arise. That is the indictment against Pearce, Ley, Trueman, and Clarkson. There is no joint charge in that indictment. Pearce is charged with stealing; Clarkson is charged with receiving. Ley and Trueman are charged with stealing; and Clarkson is charged with receiving. There are six counts of which three counts are for receiving against Clarkson and three counts are for stealing, but none of them is a joint charge as in the submission made on the last indictment. It would appear from the depositions, and from information given to me by learned counsel, that what happened

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in the Court below on July 6, two days after the other committal, was this; that evidence was first given of stealing by witnesses who were independent of the defence, police witnesses having deposed that the prisoners had been interviewed and had made statements. Then the charge of receiving was entered upon and these defendants, who had in the same Court been charged with stealing and presumably committed for trial, were called to give evidence. Counsel for the prosecution submitted to me, and cited the authorities, that there were, in fact, separate committals and that the argument which has prevailed in the last case ought not to prevail in this; that there was no technical flaw of any kind, inasmuch as that there had been a separate committal upon charges of stealing against the other defendants and a separate committal upon the charges of receiving against Clarkson. The view I take, with regard to the charges of receiving against Clarkson, is that, whilst it may possibly not have been contrary to law that the evidence of the other defendants should have been called to prove the stealing, it is certainly contrary to practice that men who are charged with offences should be called in that capacity. At page 438 of *Archbold's Criminal Pleading Etc.* (31st ed.) the rule is stated: "Where it is proposed to call an accomplice for the Crown [and obviously a man who has been committed on a charge of stealing a ham, and is called to give evidence of stealing a ham, on the same day in the same Court, is an accomplice] it is the practice (a) to omit him from the indictment; or (b) to take his plea of guilty on arraignment; . . . or during the trial, if he withdraws his plea of not guilty; . . . or before calling him either (c) to offer no evidence and permit his acquittal; . . . or (d) to enter a *nolle prosequi*." That follows the language of the illustration laid down in the passage from *Taylor on Evidence* which I read, which is supported by the various authorities. Similarly, at page 441 of *Archbold*, under the heading "charged jointly", it is said: "In the case of an indictment against two or more prisoners, one prisoner may give evidence for the Crown against a co-prisoner in the

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following cases: (1) Where a *nolle prosequi* has been entered . . . (2) where a verdict of acquittal has been given . . . (3) where the prisoner in question has pleaded guilty on arraignment or during trial . . . (4), where, though jointly indicted, he is not being tried with the prisoner against whom he gives evidence."

I pointed out that in this case there is no joint charge; and it may very well be that counsel for the prosecution is right in saying that, so far as the committal of the men on stealing is concerned, technically no objection could be taken to it; but with regard to the receiving I entertain the gravest doubt whether there was a lawful committal in that case. In any event, I have to do my utmost to see that the law is administered fairly and properly, and the view I take about this indictment is this: These three defendants were charged with the criminal offence of stealing; they were to be regarded as innocent people until they had been proved guilty in law; although they had made statements and although those statements were given in evidence, their trial had still to take place when they were called in the Court below against another man, although not charged jointly with him, to give evidence of their own stealing, and then I find that all those offences are included in the same indictment.

I have power to sever the indictment, and no difficulty would arise upon that head, but, taking all the circumstances into consideration, I think, in accordance with the practice of the criminal law, that there shall be no suggestion of unfairness or prejudice, that the proper course for me to take in this case, and I do take that course, is to quash the indictment in the case of Pearce, Ley, Trueman, and Clarkson.

Indictments quashed.

Solicitors: Clifford Knight, Leicester, for the Crown; R. A. Young, Nottingham, for the defendant Grant; Richard Barker & Son, Melton Mowbray, for the defendants Peel and Clarkson; Bray and Bray, Leicester, for the defendants Ley, Pearce, and Trueman.

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MR. JUSTICE HUMPHREYS, MR. JUSTICE WROTTESLEY AND MR. JUSTICE TUCKER.

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Evidence—Character of Prisoner—Indictment Handed to Jury—Reference to Previous Conviction—Counsel given Opportunity to Ask for Discharge of Jury—Election to Appeal—Appellant Deprived of Right of Appeal on Ground of Irregularity.

On retiring to consider their verdict, the jury were provided with a copy of the indictment which contained a reference to a previous conviction of the prisoner. When the Judge became aware of this, he informed the prisoner's counsel that he could ask for the jury to be discharged or appeal to the Court of Criminal Appeal. Counsel, after taking instructions, elected to appeal, and the appeal was brought on the ground that there had been a miscarriage of justice by reason of the jury having been informed of the previous conviction.

Held, that the course adopted by the appellant's counsel at the trial deprived the appellant of any right of appeal on that ground.

STIRLAND v. DIRECTOR OF PUBLIC PROSECUTIONS (30 Cr. App. R. 40; [1944] A. C. 315) followed.

Appeal against conviction (on certificate).

The appellant was convicted at Hertfordshire Quarter Sessions on June 19, 1944 of larceny and receiving stolen property and was sentenced by the Chairman (His Honour Judge McClure) to two years' imprisonment.

Through some oversight the jury were handed a copy of the indictment, which contained an averment of a previous conviction against the appellant. After the verdict of guilty, the Chairman looked at the indictment, and after the previous conviction had been put to the appellant and admitted by him, the Chairman said: "Members of the jury, when I look at the indictment, I should ask you this: Did you notice that fact?" The foreman and another juror said: "No, my Lord." Counsel for

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the appellant said that he felt that a grave injustice had been done, and the foreman then said: "My Lord, it is said by some of the jury that that was noticed. But that was not discussed at all. It was not mentioned." The Chairman then said: "The fact remains it may have influenced your minds." The Chairman then said to counsel for the appellant: "You could of course go to the Court of Criminal Appeal and let them decide this matter. Or I suppose I could take the course of saying that I am afraid I cannot accept the verdict of the jury as they have given it and discharge them from giving a verdict. But I would hesitate to do that." Counsel replied: "Subject to any instructions I receive, my Lord, I should be inclined to reserve my right of appeal." The Chairman then said: "You certainly should have the right to appeal, and I think, in the circumstances, I should grant you a certificate." After another matter had been mentioned, the Chairman said he would accept the verdict of the jury, and added: "It was an unfortunate matter. But it is difficult for anyone to say, speaking for all of you, that your minds may not have been affected by that, but at any rate there it is. The conviction must stand."

The Chairman granted the appellant a certificate under section 3 (b) of the Criminal Appeal Act, 1907, that the case was a fit one for appeal on the ground that the jury on retiring to consider their verdict were provided with a copy of the indictment which contained a reference to a previous conviction.

W. G. Carmichael, for the appellant:

It is submitted that a grave irregularity occurred by reason of the jury having been informed of a previous conviction of the appellant before they returned their verdict. It is submitted, further, that the effect of this irregularity is a matter proper to be considered on appeal, and that the appellant should not be precluded from relying upon the irregularity in this Court by reason of the fact that no application was made for the discharge of the jury. The Chairman himself

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expressed the view that that would not be a satisfactory course, and that the matter was one which more properly might be raised on appeal.

F. D. Levy, for the Crown.

TUCKER, J.: Counsel for the appellant now asks us to quash this conviction on the ground of this admitted irregularity. The position with regard to that is that this Court has certain powers which are conferred upon it by statute with regard to appeals, and they appear, so far as relevant to this case, in the Criminal Appeal Act, 1907, s. 4 (1), which provides: "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal". It is unnecessary for this purpose to refer to the proviso. This case does not fall within any of the earlier provisions of that section, but comes under those concluding words "or that on any ground there was a miscarriage of justice". Therefore the appellant in a case like this has to show, first of all, that there has been some irregularity of this kind, and, secondly, that it has resulted in fact in a miscarriage of justice.

In that connection this Court has often had to consider to what extent, if at all, the rights of an appellant on appeal are affected in matters of this kind by the course taken by counsel at the trial. It was suggested at one time, with reference to cases where there had been some irregularity with regard to the evidence, where questions had been asked which resulted in answers revealing a man's previous conviction emerging during the trial, that, if the prisoner, being represented by counsel, did not there and then apply to have the jury discharged, he could not thereafter complain with regard

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to the admission of such evidence. That matter and kindred matters of that kind have recently been dealt with in STIRLAND v. DIRECTOR OF PUBLIC PROSECUTIONS (30 Cr. App. R. 40; [1944] A. C. 315). In that case Viscount Simon, L.C., dealing with this matter, said as follows (30 Cr. App. R. at p. 55; [1944] A. C. at p. 327): "A further question was raised in the present appeal which can be briefly disposed of. Atkinson, J., in delivering the judgment of the Court of Criminal Appeal, called attention to the decision of that Court in WATTAM (1941), 28 Cr. App. R. 80, where the present Lord Chief Justice quoted the observation of Lord Hewart, C.J., in FIRTH (1938), 26 Cr. App. R. 148 at p. 153, and treated that observation as amounting to a ruling that a conviction cannot be quashed on the ground of the improper admission of evidence prejudicial to the prisoner unless an application is made by counsel for the prisoner for the trial to be begun again before another jury. No such application was made in the present case. I doubt whether Lord Hewart's words require so strict a construction, but, in any case, it seems to me that there cannot be a universal rule to this effect. It has been said more than once that a Judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself (see ELLIS, 5 Cr. App. R. 41, at p. 62; [1910] 2 K. B. 746, at p. 764). If that be the Judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt, as Bray, J., said at pp. 61 and 763 of the respective reports in the same case, the Court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal".

In this case we have to look and see whether, in the circumstances which took place after the jury had given their verdict,

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counsel for the prisoner used his discretion, knowing what had happened, with a view to preserving a right of objection on a possible appeal. Sympathising, as I think we all do, with the position of counsel in a matter of this kind which arises very suddenly and unexpectedly, none the less we have to look and see what he did; and in this case our view is that, although perhaps not encouraged, he was clearly given by the Chairman an opportunity of applying to have the jury discharged and a fresh trial before another jury. He deliberately, having asked for an opportunity to take instructions on the matter, elected not to take that course, avowedly for the purpose of and with the intention of coming to this Court instead. In our view, he was doing the precise thing to which Viscount Simon, L.C., was referring in STIRLAND'S CASE (*supra*) when he said that such a course would be a matter which this Court might think resulted in depriving the appellant of the right to complain of any such irregularity as occurred in this case. Of course, it would always be open to the appellant on other grounds to argue or maintain that the verdict was unreasonable or could not be supported having regard to the evidence; but no such grounds are brought before us and, this being the only ground, for those reasons this appeal is dismissed.

Appeal dismissed.

Solicitor: W. H. Hanscombe, for the Crown.

BEFORE

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Trade Dispute—Illegal Strike—"Acts in Furtherance of a Strike"—Limitation to Acts Done after Commencement of Strike—Trade Disputes and Trade Unions Act, 1927 (17 & 18 *Geo.* 5, *c.* 22), *s.* 1 (2).

By the Trade Disputes and Trade Unions Act, 1927, s. 1 (2) "If any person declares, instigates, incites others to take part in or otherwise acts in furtherance of a strike or lock-out, declared by this Act to be illegal, he shall be liable" to penalties.

The phrase "otherwise acts in furtherance of a strike" in the above sub-section is to be construed as being limited to acts done after the strike has commenced.

Dicta of Lord Loreburn, L.C., and Lord Shaw of Dunfermline in CONWAY v. WADE, [1909] A. C. 506 at pp. 512 and 522, followed.

Where a count alleging an act of furtherance is included in an indictment, particulars of such furtherance should be set out.

Appeals against conviction and sentence.

The appellants were convicted at Northumberland Assizes on June 19, 1944, of acting in furtherance of an illegal strike, and of aiding and abetting the commission of an illegal strike, contrary to section 1 (2) of the Trade Disputes and Trade Unions Act, 1927, and were sentenced by Cassels, J., Tearse and Lee to twelve months' imprisonment and Haston to six months' imprisonment.

The appellants were members of the Revolutionary Communist Party and operated through an organisation called the Militant Workers' Federation. Apprentices serving in the shipyards on the Tyne were during the period November 1943

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to February 1944 disturbed by the possibility that, as a result of the mining ballot scheme, they might be removed from the shipyards and sent to work in coal mines. On February 7, 1944, a letter was sent to the Minister of Labour and National Service protesting that unless legislation were passed within three weeks guaranteeing the unconditional exemption of all shipyard apprentices (irrespective of industrial group) from the mining ballot scheme the apprentices' labour would be withheld. The bulk of the evidence for the prosecution (which was in the main uncontradicted) related to the acts and conduct of the appellants before the strike broke out on February 28. At the close of the case for the prosecution defending counsel submitted that the words in section 1 (2) of the Trade Disputes and Trade Unions Act, 1927, "acts in furtherance of a strike" presupposed the existence of a strike and that nothing which took place before the strike began could constitute an act in furtherance. Cassels, J., in overruling this submission said: "It is not necessary that the act in furtherance of an illegal strike should be during the actual time of the strike; it may be an act before the strike as well as an act during the strike, if it should be an act which could reasonably be regarded, upon the evidence, as an act in preparation for the strike . . ."

James Burge, for the appellants.

The Judge was wrong in the construction which he placed on the words "acts in furtherance of a strike". The words have already been the subject of judicial interpretation. In CONWAY v. WADE, [1909] A. C. 506, Lord Loreburn, L.C., and Lord Shaw of Dunfermline both expressed the view that the words presuppose that the strike is already existing. That case was decided under the Trade Disputes Act, 1906, and it is significant that section 3 of that Act used the words "in contemplation or in furtherance of a trade dispute", whereas the Act under which the present prosecution was brought omitted the words "in contemplation or". It is submitted that in construing section 1 (2) of the Act of 1927 the Court should follow the view of Lord Loreburn, L.C., and Lord Shaw of

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Dunfermline, especially as the words occur in a penal subsection creating a new crime.

C. Paley Scott, K.C., and *John Charlesworth*, for the Crown.

The construction given to the words "in furtherance of" in the Act of 1906 by Lord Loreburn, L.C., and Lord Shaw of Dunfermline was only *obiter*. The words "in contemplation or" may have been dropped from the Act of 1927, because "in furtherance of" was intended to be regarded as a comprehensive phrase, which would include acts done both before and after the commencement of the strike. It is submitted that that is the natural interpretation of the words and the one which the Court ought to follow.

Cur. adv. vult.

Sept. 25.—The following judgment was read by

WROTTESLEY, J.: These appellants were charged together with Angel Keen, who has not appealed, with various offences against the Trade Disputes and Trade Unions Act, 1927. They were charged, first, with conspiring together to act in furtherance of a strike declared by section 1 of that Act to be illegal, namely, the strike of the Tyneside apprentices, and of this they were acquitted by the verdict of the jury. In the second place each of them was charged with acting in furtherance of such a strike, and of this each of them was found guilty. In the third place each of them was charged with aiding and abetting the commission of such an illegal strike by aiding others to act in furtherance of the strike, and each was found guilty. In the fourth place each of them was charged with conspiracy to incite the apprentices to declare such an illegal strike, and of this they were acquitted by the verdict of the jury. Finally, each of them was charged with actually inciting others to declare such an illegal strike and of this they were also acquitted by the verdict of the jury.

The evidence upon which all these charges rested was taken together, and no attempt was made to distinguish between

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those parts of it which supported any one charge as compared with any other charge.

The appellants and Keen are members of the Revolutionary Communist Party; they call themselves Trotskyists, and operate through an organisation called the Militant Workers' Federation. The matters relied upon by the Crown arose out of the relations between the appellants and the apprentices serving in the shipyards on the Tyne. These apprentices were much disturbed, during the period November, 1943, to March, 1944, by the possibility that they might, as the result of the ballot, be taken from their work in shipyards and sent to work in coal mines. Among them was one Davey, a member of the Young Communist League, who in that way got in touch with the appellant Lee and the defendant Keen, and so first with Haston, who was general secretary of the Revolutionary Communist Party and wrote for a newspaper called "The Socialist Appeal", and finally with Tearse, honorary secretary and organiser of the Militant Workers' Federation. The evidence of the prosecution was in the main uncontradicted, and consisted of the story told by Davey and other apprentices, and of correspondence and other documents prepared by one or other of the defendants, the authenticity of which was not disputed. In general this evidence was, before the conclusion of the trial, confirmed by the evidence of the defendants themselves. From this it is abundantly clear that there was ample material upon which a jury might have found all the defendants, with the possible exception of Haston, guilty of the first count, namely, conspiracy to act in furtherance of the strike, which actually occurred, and also of conspiracy to incite and of actually inciting the apprentices to strike, as in fact they did, after the issue of a letter on March 7 to the Minister of Labour threatening that unless legislation were passed within three weeks to guarantee the unconditional exemption of all apprentices (irrespective of industrial group) from liability to direction under the mining ballot scheme, the apprentices' labour would be withheld. The jury, however, negatived the case for the Crown under these heads, and found the four defendants guilty

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only of doing acts in furtherance of the strike and of aiding and abetting Davey and others to act in furtherance of a strike.

It is necessary here to say that the bulk of the evidence dealt with the acts and behaviour of the defendants before the strike broke out, which consisted of the preparation of plans, some of which were reduced into writing, for the setting up of various committees for the better and more efficient conduct of the strike, and for the co-ordination of it with other strikes elsewhere, and the preparation of documents for the purpose of inflaming the minds of the apprentices, and the making of speeches to meetings of apprentices along the same lines.

At the close of the evidence for the Crown, counsel for the defendants submitted, among other matters, that the words in section 1 (2) of the Trade Disputes and Trade Unions Act, 1927, "acts in furtherance of a strike" presuppose the existence of a strike, and that, therefore, nothing that took place before March 28, the day when the strike began, could be said to be such an act. Upon that submission the Judge ruled that the prosecution were not confined to acts done after the strike had begun, and in the course of his summing up, in dealing with counts 2 to 5, he said: "It is not necessary that the acts in furtherance of an illegal strike should be during the actual time of the strike; it may be an act before the strike as well as an act during the strike, if it should be an act which could reasonably be regarded, upon the evidence, as an act in preparation for the strike and that that strike is an illegal one. Counts 6, 7, 8 and 9 are against respectively Tearse, Lee, Keen and Haston for aiding and abetting Davey and others to act in furtherance of a strike declared by the Act of Parliament to be illegal, and you may take it that a person aids and abets the commission of an offence if he is present and assists in carrying it out". These appellants say that, in view of the language of the section, there was a misdirection of law. The matter is not free from doubt, but the Court has come to the conclusion that the view submitted by counsel for the appellants at the trial and here before us

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is the true view, and I proceed to give the reasons which have induced us to come to this conclusion.

The Act deals both with strikes and lock-outs, and the relevant parts of section 1 of that Act are as follows: "It is hereby declared—(a) that any strike is illegal if it—(i) has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers are engaged; and (ii) is a strike designed or calculated to coerce the Government either directly or by inflicting hardship upon the community"; and—I pass over the words referring to lock-outs—"it is further declared that it is illegal to commence, or continue, or to apply any sums in furtherance or support of, any such illegal strike or lock-out". The section goes on: "For the purposes of the foregoing provisions—(a) a trade dispute shall not be deemed to be within a trade or industry unless it is a dispute between employers and workmen, or between workmen and workmen, in that trade or industry, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of persons in that trade or industry; and (b) without prejudice to the generality of the expression 'trade or industry' workmen shall be deemed to be within the same trade or industry if their wages or conditions of employment are determined in accordance with the conclusions of the same joint industrial council, conciliation board or other similar body, or in accordance with agreements made with the same employer or group of employers".

Sub-section 2 of the same section provides: "If any person declares, instigates, incites others to take part in or otherwise acts in furtherance of a strike or lock-out, declared by this Act to be illegal, he shall be liable" to the punishment set out in the section. "Provided that no person shall be deemed to have committed an offence under this section or at common law by reason only of his having ceased work or refused to continue to work or to accept employment". The important words are: "If any person declares, instigates, incites others to take part in or otherwise acts in furtherance of a strike".

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If these words fell to be construed apart from the consideration of previous legislation and pronouncements upon that legislation, it might be difficult to suggest that any restriction should be placed upon the meaning of the word " furtherance ". In English literature it is found applied equally to mean the advancement of things before they come into existence, and after they have been begun. But the words " in furtherance of a trade dispute " have a history. In 1906 the Trade Disputes Act, section 1, which is to be construed as one with, amongst others, the Trade Disputes and Trade Unions Act, 1927, added to section 3 of the Conspiracy and Protection of Property Act, 1875, the following paragraph: " An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable ".

In CONWAY v. WADE, [1909] A. C. 506, the defendant, a trade union representative, who had succeeded in getting a man dismissed from his employment by threatening to bring out the other employees unless he were dismissed, invoked the protection of this paragraph. A jury found that no trade dispute was at the time within contemplation or in execution, and that the defendant acted as he did with a view to forcing the plaintiff to pay a fine due to the trade union, and awarded the plaintiff damages. In upholding the decision, some of their Lordships took the opportunity to consider and observe upon the meaning of the language " an act done in contemplation or furtherance of a trade dispute ". And both Lord Loreburn, the Lord Chancellor, and Lord Shaw expressed the view that an act done in contemplation meant an act before the dispute arose, and an act in furtherance meant an act done when the dispute had come into existence. These observations and this distinction were not necessary to the decision in that case, but we think there can be no doubt that they are right. If " act in furtherance " had meant or included an act done with a view to the dispute, and before it came into existence, there was no need for the words " in contemplation of ".

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When the Act of 1927 was passed, Parliament must have been aware that the words " in furtherance of " an object had this restricted meaning, that the thing to be furthered must be in existence, the more so as the word is used more than once elsewhere in the Act in a context in which it refers to something already in existence. Is there anything in section 1 (2) of the Act of 1927 to indicate that a wider meaning is to be attributed to this phrase? Firstly, it is here linked up with the word " strike " as contrasted with " dispute ". That cannot, we think, lead to a wider meaning for the word " furtherance ". Secondly, it is here used not merely to define the limits within which a man may lawfully agree with another in restraint of trade, but to create a new statutory indictable offence. In such a context it would require clear words to indicate that " furtherance " is to be given a wider meaning than it carries in other parts of these Acts (which are to be read as one) and indeed in the Act itself. It was suggested that the whole phrase is a mere repetition of the former phrase " in contemplation or furtherance ", substituting for the vague words " in contemplation " words more appropriate for a criminal offence, namely declaring, instigating, inciting. It is not necessary for us either to assent to or dissent from this proposition. But we should not expect the Legislature to create new statutory offences by the use of words so vague as " acts in contemplation of a strike ".

In the event, therefore, we think that the acts done before a strike which are made crimes by this section are the matters mentioned *eo nomine*, that is to say, declaring it, instigating it, inciting to it; and that the acts " otherwise in furtherance of a strike " which are made crimes by this section are acts done after the strike has commenced. Applying this conclusion to the case under appeal, the jury should have been directed by the Judge that under the counts alleging acts of furtherance or aiding and abetting others to do acts of furtherance against the defendants, they must confine their attention to evidence of acts committed after the strike had broken out. In fact the jury were, as has been pointed out, told the contrary of this,

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and the conviction under these counts cannot stand, and must be quashed.

There is one other matter upon which we think it is desirable that we should say something. Perhaps because in the case under appeal both those concerned for the prosecution and those concerned for the defence concentrated their attention on the more important counts, such as the conspiracy counts, and the counts relating to incitement, no particulars were either included in the indictment or demanded by the defence of the counts alleging acts in furtherance against the defendants. From every point of view, but particularly from the point of view of those accused of such matters, we think it desirable that where counts are included in an indictment alleging acts of furtherance, particulars of such acts should be included in the indictment.

Convictions quashed.

Solicitors: Smithdale, Rutledge & Co., for the appellants.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SINGLETON AND MR. JUSTICE BIRKETT.

SALOMON LEON.

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Obtaining Credit by Fraud—No Actionable Debt—Loss Incurred under Credit Betting Arrangement with Bookmaker—Fraud in Wagering—Intention to Cheat at Time when Bet Made—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *ss.* 13 (1), 18—*Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 17.

By section 13 (1) of the Debtors Act, 1869 "Any person shall . . . be deemed guilty of a misdemeanour . . . if in incurring any debt or liability he has obtained credit by false pretences, or by means of any other fraud . . ."

The "debt" referred to in section 13 (1) does not include a loss incurred by a backer under a credit betting arrangement with a bookmaker. Consequently, a backer is not liable for

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obtaining credit by fraud from a bookmaker under this section, even though at the time when the arrangement was made he never intended to pay if he lost.

By section 17 of the Gaming Act, 1845 "Every person who shall, by any fraud . . . in wagering on the event of any . . . sport . . . win from any other person . . . any sum of money . . . shall be deemed guilty of obtaining such money . . . from other such person by a false pretence . . ."

By section 18 : ". . . all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be void".

A backer who has entered into a credit betting arrangement with a bookmaker, and is proved to have been fraudulent throughout, in the sense that at the time of making a bet he intended to accept the money if he won, but not to pay if he lost, may be convicted of fraud in wagering under this section.

Appeal against conviction and sentence.

The appellant was convicted at the Central Criminal Court on October 25, 1944, on two counts of an indictment charging him with obtaining credit by fraud, contrary to section 13 (1) of the Debtors Act, 1869, and on three counts charging him with fraud in wagering, contrary to section 17 of the Gaming Act, 1845, and was sentenced by Oliver, J., to concurrent terms of nine months' imprisonment.

In May, 1944, the appellant desired to change his bookmaker, and was introduced to a bookmaker named Jack Wilson, the prosecutor in the case. The prosecutor agreed to accept the appellant's bets up to £500 a week, the appellant assuring him that he was perfectly well able to meet that obligation. The counts under the Debtors Act related to losing bets made by the appellant in June and July, 1944, in respect of which the appellant refused to pay his losses, and the counts under the Gaming Act to sums paid by the prosecutor in May, 1944, in respect of winning bets made by the appellant. Evidence was given at the trial to show that the appellant was not in a position to meet a loss of £500 a week by the appellant's bank manager and by three other bookmakers with whom the appellant was having betting transactions about the same time.

Oliver, J., directed the jury, on the counts under the

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Debtors Act: "A man who loses money to a bookmaker by making a losing bet does incur a debt, even although it is not enforceable"; and on the counts under the Gaming Act: "Do you regard that as money that he had won by cheating in the circumstances of this case? and before you came to that conclusion, it seems to me that you would have to come to the conclusion that you are satisfied that when he entered into those three sets of transactions he never intended to pay if he lost; that he intended to put the money in his pocket if he won, but he never intended to pay if he lost".

S. Lincoln, for the appellant.

The Judge was wrong in directing the jury that a debt within the meaning of section 13 of the Debtors Act, 1869, could be incurred in respect of a losing bet. Section 18 of the Gaming Act, 1845, which provides that "all contracts or agreements . . . by way of gaming or wagering shall be null and void" appears to have been overlooked at the trial. The debt or liability referred to in section 13 must be one which is actionable in law. [He referred to RAWLEY v. RAWLEY (1876), 1 Q. B. D. 460, per Cockburn, C.J., at p. 463; LUCKETT v. WOOD (1908), 24 T. L. R. 617; and HAIGH v. SHEFFIELD CORPORATION (1874), L. R. 10 Q. B. 102.] A person who is a party to a betting transaction incurs no debt or liability which is enforceable in law, and therefore cannot be liable under section 13 of the Debtors Act, 1869. With regards to the charges under section 17 of the Gaming Act, 1845, the fraud contemplated by the section is an unlawful device or ill-practice in the course of the game. The words have no relation to payment of money lost, which may take place much later.

[Singleton, J.—If a man in making a bet has made up his mind that he will not pay if he loses, is not that fraud in wagering?] There can be fraud only where there is an ill-device or fraud in the actual making of the wager, apart altogether from any question of payment at a later date. The Judge's direction to the jury on the construction of this section was, therefore, wrong.

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G. O. Slade, K.C., and *L. A. Byrne*, for the Crown.

A debt within the meaning of section 13 of the Debtors Act, 1869, may be incurred although it is not a debt enforceable in law. There are two kinds of debts, actionable debts or debts enforceable in law, and other debts, such as debts of honour. [He referred to RAWLEY v. RAWLEY (*supra*) per KELLY, C. B., at p. 467, and MELLISH, L.J., at pp. 467-8.] With regard to section 17 of the Gaming Act, 1845, there is fraud in wagering within the meaning of the section if at the time of the making of the bet the person making it had no intention of paying if he lost. In the present case the Judge's direction was correct. There was ample evidence on which the jury could find that the appellant had been fraudulent throughout and had never had any intention of paying when he made the bets.

SINGLETON, J.: The appellant, Salomon Leon, was convicted at the Central Criminal Court on October 25, 1944, on two counts of an indictment which charged him with obtaining credit by fraud, contrary to section 13 of the Debtors Act, 1869, and on three counts which charged him with fraud in wagering, contrary to section 17 of the Gaming Act, 1845. By direction of the Judge he was acquitted on the first three counts of the indictment which charged him with obtaining money by false pretences. On the counts on which he was convicted he received sentences of nine months' imprisonment, such terms to run concurrently.

He now appeals against conviction and sentence, and by his notice of appeal he alleges, first, that the learned Judge wrongfully refused to withdraw the case from the jury at the close of the case for the prosecution on a submission that the evidence then adduced did not in law prove the offences as charged within section 13 (1) of the Debtors Act, 1869, and within section 17 of the Gaming Act, 1845; secondly, that there was no evidence before the jury that the offences as charged in the indictment had been made out; thirdly, that the learned Judge misdirected himself as to the law applicable to the case; fourthly, that the learned Judge omitted to direct the jury

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sufficiently and that he did not put the case for the defence adequately to them; fifthly, that the verdict of the jury was against the weight of the evidence, and, sixthly, that the sentence is harsh in the circumstances.

The prosecutor is a turf commission agent named Jack Wilson, who in May, 1944, received the name of the appellant as a customer or client, and accordingly sent to the appellant a book of his rules. One of the rules was that settlement must be made weekly, which is a common provision. About May 25, the appellant called at the office of the prosecutor and there was an interview at which the prosecutor asked the appellant why he was changing his bookmaker, and he was told that the reason was that his bookmakers were talking and that it was damaging to his business in Hatton Garden, whatever that business was. After the discussion it was arranged that the prosecutor would accept the appellant's bets up to £500 a week, and, according to the prosecutor's evidence, which it would appear the jury accepted, he said to the appellant: "Very well. Are you sure you can meet that obligation?", and the appellant answered: "Perfectly". Accordingly the prosecutor accepted bets from the appellant. He said that he gave him credit, though it is perhaps questionable whether that is the proper description of the arrangement, which was in fact that the prosecutor agreed to accept bets from the appellant up to a limit of £500 in any week, and it was further agreed that settlement should be made each week. The appellant made certain bets with the bookmaker on horses engaged at various meetings. In the week ending June 3, the appellant won £140. In the following week he won £100, and in the week ending June 17 he won £225. He was paid those sums by the prosecutor's cheques, and those sums are the sums charged in the counts alleging offences under section 17 of the Gaming Act, 1845. Thereafter fortune changed, and in the following two weeks the appellant lost £147 19s. 1d. and £305 respectively. He did not pay either of those sums, and it is a fair inference that he was not only unable to do so, but unwilling to do so. That is a fair inference, having regard to

the verdict of the jury. Those two items are the items included in the counts alleging offences under section 13 of the Debtors Act, 1869.

Evidence was given at the trial to show that the appellant was not in a position to meet a loss of £500 a week, and that at all material times his account at the bank was considerably overdrawn. Very many of his cheques were returned. Considerable sums of money did pass through the banking account, but there was at all material times a heavy overdraft. Furthermore, evidence was given by three other bookmakers, with whom the appellant was having betting transactions about the same time, to show that the unfortunate result of his transactions with the prosecutor could not be due to accident or mistake or to any belief that the bank would meet his cheques. The bookmakers were, first, a man named Dion, who said that the appellant lost to him a sum of £40 on June 14, another sum of £20 shortly afterwards, and the following week the sum of £55, making £115 altogether, of which nothing was ever paid. A cheque was sent in respect of the first week, which no doubt induced the bookmaker to allow a bet or bets in the following week, but the cheque was never met. The second bookmaker was a man named Lee, who during the month of May paid to the appellant bets which the appellant won, and in June or thereabouts the appellant lost a sum of £57 10s. 0d. which was never paid. The third bookmaker was a man named Lotine, and about June 10 the appellant lost to him a sum of £249 5s. 8d. in the week. The appellant's cheque was not met; it was presented and re-presented at the appellant's request, and the appellant was allowed to bet further and it so happened that he won the sum of £94, which reduced the debt outstanding to £151 13s. 8d., which is still owing.

The case for the prosecution was that the appellant was fraudulent throughout, that he never intended to pay if he lost, but was bent on obtaining money; in other words, that he was determined to cheat the bookmaker by pretending to be betting on the ordinary terms, and thus representing himself as willing

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to meet his obligations, whereas he never intended to do so. Obviously, this is a matter which is not easy to prove, but the jury were satisfied on the evidence of the bookmakers and of the appellant's bank manager, who was an unsatisfactory witness, and after hearing the evidence for the appellant, that the appellant was in fact fraudulent throughout his dealings with the bookmaker. The issue was put quite clearly by Oliver, J., who presided at the trial, in this way: "The question you must pose to yourselves right through this matter is this: from the moment this man went to Wilson, from the moment he left him, did he intend to cheat, to see what he could get out of him, and if he lost not to pay?". The jury's verdict, after that direction, was arrived at on its being proved to their satisfaction that the appellant was acting fraudulently throughout. There was evidence on which they could so find, and this Court is not further concerned with that part of the case. It was somewhat faintly suggested by Mr. Lincoln that there was misdirection by the learned Judge in that he did not sufficiently put or stress the appellant's case. There is no substance in that submission.

The matters to which our attention has been chiefly directed are difficult questions of law, and it remains to consider the submissions which were made as to what is the true position in law. On the counts under section 13 of the Debtors Act, it was argued by Mr. Lincoln that no offence had been committed, for the section, said he, in referring to a debt must be taken to mean an actionable debt or a debt enforceable in law. The section, in so far as is material, provides: "Any person shall in each of the cases following be deemed guilty of a misdemeanour . . . (1) if in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud". The two counts under the Debtors Act, counts 4 and 5 of the indictment, were under that section, and the charge in count 4 was that "the appellant on June 24 in incurring a debt or liability to Jack Wilson obtained credit to the amount of £147 19s. 1d. from the said Jack Wilson by means of fraud", and the fifth count is in similar terms in

relation to the sum of £305. Mr. Lincoln in support of his argument referred us to several authorities. In the first place he referred us to RAWLEY v. RAWLEY (1876), 1, Q. B. D. 460, and in particular he cited the words of Sir Alexander Cockburn, C.J., at p. 463: "The right of set-off depends, I think, upon there being an actionable debt. The statute, no doubt, speaks of 'debt', but that, unless a very narrow construction be adopted, means actionable debt". Mr. Slade in reply referred to the judgments of the Court of Appeal in that case, and particularly to a passage in the judgment of Jessel, M.R., at p. 466 where he said: "And it has always been accordingly held, that a set-off can only be successfully pleaded when an action could have been maintained for the same debt"; the words of Kelly, C.B., at p. 467: "But are these mutual debts here, when one of them is a debt for which an action cannot be brought?", and the words of Mellish, L.J. on pp. 467-8: "The judicial construction of this section has been, that no debts can be used by way of set-off except such as are recoverable by action". Mr. Slade's object in citing those passages to us was to make his point that there were two kinds of debts, actionable debts or debts enforceable in law, and other debts such as debts of honour. We were also referred to LUCKETT v. WOOD (1908), 24 T. L. R. 617, and HAIGH v. SHEFFIELD CORPORATION (1874), L. R. 10 Q. B. 102, and further to the words of section 18 of the Gaming Act of 1845. That section provides as follows: "And be it enacted that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void". It was pointed out to us by Mr. Lincoln that the learned Judge appeared in his direction to the jury to treat gaming debts as voidable, whereas by section 18 of the Act of 1845 they were declared to be null and void. It does not appear to us that the authorities which were cited are of great help on this part of the case, but it is right to say that there is some authority for saying that the word "debt" in a statute means an actionable debt, and *a fortiori* it would appear to be so in a penal section such as section 13 of the Debtors Act, 1869.

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We think, however, that more help is to be obtained by an examination of the Act itself. The Debtors Act, 1869, is entitled: "An Act for the abolition of imprisonment for debt, for the punishment of fraudulent debtors, and for other purposes". Part I deals with the abolition of imprisonment for debt, and Part II, which includes section 13, deals with the punishment of fraudulent debtors and is mostly concerned with bankruptcy offences. It is not necessary to consider Part III. It is difficult to think that betting transactions were contemplated by the Legislature within the framework of the Act. One cannot envisage imprisonment for a gambling debt or bankruptcy arising directly from such a debt, for the Legislature twenty-four years earlier had said in section 18 of the Gaming Act, 1845, that any such contract was null and void. It is to be remembered that no credit was given when the arrangement was made. There was nothing more than an agreement to accept bets if made up to a certain limit, and again no credit was given when a bet was placed and accepted; it was only when the fancied horse lost that a "debt" so-called arose and the credit was given. In our view, losses so incurred are not debts within the meaning of section 13 of the Debtors Act, 1869, and we have come to this conclusion upon an examination of the Act itself and of its scope. Oliver, J.'s direction on this part of the case was in these terms: "Well, of course, it"—that is a betting debt—"is not enforceable in law, but as a matter of law I direct you that a man who loses money to a bookmaker by making a losing bet does incur a debt, even although it is not enforceable". A little later he says: "But I tell you that up to the time that he repudiates he has incurred a debt". Unfortunately the learned Judge's direction was not drawn from the wording of section 18 of the Gaming Act, 1845. We think the direction was not an accurate statement of this somewhat difficult branch of the law, which is one upon which there does not appear to be any direct authority. Consequently, the convictions on counts 4 and 5 of the indictment must be quashed. It is perhaps not inappropriate to remark that the magistrate before whom the case came did not

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commit upon those charges. They were put before him but he did not commit upon them, being of opinion, apparently, that there was no case upon which he ought to commit.

With regard to the charges under section 17 of the Gaming Act of 1845, that section, as far as material, reads as follows: "And be it enacted that every person who shall, by any fraud or unlawful device or ill-practice in playing at or with cards, dice, tables or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same". Leaving out some of the words, one reaches this: "Every person who shall by any fraud in wagering on the event of any sport win from any other person a sum of money shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence". It is to be observed that something more than what is commonly known as obtaining money by false pretences is contemplated by the Legislature. The counts in the indictment, counts 6, 7 and 8, are framed in the statement of offence as obtaining a valuable thing by false pretences contrary to section 17 of the Gaming Act, 1845, and then in the particulars it said: the appellant on such-and-such a day by fraud in wagering on the events of horse races won from Jack Wilson a valuable thing, to wit, a cheque for £140, and there are the other sums in the other counts. Mr. Lincoln submitted to this Court that it was necessary to show fraud in wagering, and that is quite right. The difficulty is to see what "in wagering" means. For the purposes of this appeal it must be taken that the jury, who had this case before them for some time, were all satisfied that the appellant was fraudulent throughout. Mr. Lincoln cited to us authorities under this section, which were all dealing with games of cards. They were R. v. BRIXTON PRISON (GOVERNOR), [1912] 3 K. B. 568,

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and MOORE, 10 Cr. App. R. 54. In those cases it was said that, in a game of cards or a game such as a three-card trick, it was not sufficient to show that there was fraud before the game started, but there must be shown fraud in the course of the game itself. Of course, a game of cards is not quite the same thing as wagering. The act of making a wager is done by a word or a few words, an offer and an acceptance. Mr. Slade submitted on behalf of the Crown that unless in the circumstances of this case the offence of fraud in wagering was committed, it was difficult to see when it could be, and, as he remarked, wagering is instantaneous, and he submitted that the circumstances of this case showed that there was evidence on which it was open to the jury to find fraud in wagering.

Reference has already been made to the direction of the learned Judge on the case generally, and it is right to point out again that in the course of his summing-up the learned Judge, dealing with the Act of 1845, said: "Now the other three charges are for a different matter. They are framed under a very old statute some 100 years old, the Gaming Act of 1845, and that deals with conduct which is described as 'obtaining money by fraud in wagering'. It is rather quaint language—'fraud in wagering', but that undoubtedly, I tell you as a matter of law, would include obtaining money by fraud in backing horses. Again you have to answer the question and I think it is exactly the same question. The facts of these cases are not quite the same as the last two, because they are earlier in date and I will point out the dates to you. On his three weeks of betting with Wilson he won, the first week £140 (count 6), the second week £100 (count 7), the third week £225 (count 8). Do you regard that as money that he had won by cheating in the circumstances of this case? and before you came to that conclusion, it seems to me you would have to come to the conclusion that you are satisfied upon the evidence and upon the facts that when he entered into those three sets of transactions he never intended to pay if he lost; that he intended to put the money in his pocket if he won, but he never intended to pay if he lost". The real

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question which was put to the jury was: Was the appellant fraudulent throughout? and they said: Yes, he was. That seems to us to mean, and necessarily to mean, that at the time that the appellant made each of these bets with the bookmaker, he intended to cheat and defraud the bookmaker. In those circumstances it seems to us that there was, as Oliver, J., held, evidence on which the jury could come to the conclusion that this offence was proved and they so found. It follows that the appeal against conviction on counts 6, 7 and 8 fails. At the same time we think it right to point out this. This is a set of circumstances which can very seldom happen. There was evidence in this case which satisfied the jury that the appellant was fraudulent throughout. It is perhaps as well to remark that that set of circumstances can seldom recur by way of proof.

The result of the appellant's appeal is that he succeeds on one part of the case and fails upon the other.

The sentence which was passed upon him was one of nine months' imprisonment. He appeals also against his sentence. As this Court has found some part of the case against him not proved, we think it right that there should be some alteration in his sentence, and the sentence accordingly is reduced from nine months' to three months' imprisonment.

Conviction quashed in part.
Sentence reduced.

Solicitors: Burnett L. Elman, for appellant; Samuel Coleman, for the Crown.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE SINGLETON, AND MR. JUSTICE CROOM-JOHNSON.

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False Pretences—Operative Inducement—Mode of Proof—No Direct Evidence from Witness—Conviction Affirmed.

Although the prosecution are bound on a charge of obtaining property by false pretences to prove that the alleged false pretence was the operative inducement which led the person alleged to have been defrauded to part with his property, proof need not in every case be afforded by the direct evidence of a witness to this effect, if the facts are such that the alleged false pretence is the only reason which could be suggested as having been the operative inducement.

Conviction affirmed in a case where there had been no direct evidence from any witness as to the inducement which led him to part with his property.

GRAIL (1944), (30 Cr. App. R. 81) distinguished.

Appeal against conviction.

The appellant was convicted at Buckinghamshire Quarter Sessions on October 16, 1944, on nine counts of an indictment charging him with obtaining property by false pretences and was sentenced by the Deputy-Chairman to concurrent terms of twelve months' imprisonment.

Towards the end of January, 1944, the appellant inserted in the "Morning Advertiser" an advertisement in the following terms: "Dartboards. Actual maker can now accept limited number of orders; selected elm; rustless steel wires; double-sided; guaranteed N.D.A. specification; £1 carriage paid; state whether trebles, clock, or fives; J. Sullivan". In answer to that advertisement a number of persons, including the nine persons named in the indictment, all nine being licensed victuallers, sent the appellant a postal order or cheque for one or more than one dartboard. No dartboards had been supplied by the appellant when he was arrested at the end of

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May, and at that time none of the persons named in the indictment had received their money back. The false pretence alleged in each count was that the appellant was an "actual maker of dartboards". Evidence was given to the effect that the appellant had no wood or wire in his possession, and had no premises suitable for the manufacture of dartboards. The nine persons alleged to have been defrauded were called as witnesses, but none of them was asked by counsel for the prosecution what was his reason for parting with his money or what effect the advertisement had had upon his mind. Two of them were asked by the Deputy-Chairman why they had parted with their money, and each replied: "Because I wanted a dartboard". The appellant, in his evidence, said that he did not intend by the advertisement to represent that he was at the time an actual maker of dartboards, and that all that he meant to represent was that he intended to become a maker of dartboards in the near future. He said further that he hoped to be able to procure the necessary wood and wire and premises, and had made inquiries relating thereto, and that he had the requisite skill, as before 1939 he had made a number of dartboards as an amateur. He also said that a number of the letters demanding repayment had remained at an address which he had left and had not been forwarded to him.

T. R. Fitzwalter Butler, for the appellant.

There was no satisfactory evidence that the operative inducement which led any of the persons alleged to have been defrauded to part with their money was the false pretence named in the indictment, which was laid in very narrow terms. None of them was asked by counsel for the prosecution, "Why did you part with your money?" or even "Did you believe the advertisement to be true?" [He referred to GRAIL (1944), 30 Cr. App. R. 81.] Further, when two of them were asked by the Deputy-Chairman why they parted with their money, their reply was simply: "Because I wanted a dartboard". Further, the summing-up, though in many respects a very careful and accurate one, failed to make it

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clear to the jury that they were entitled to convict only if they were satisfied that the false pretence laid in the indictment was the operative inducement which led the persons alleged to have been defrauded to part with their money.

H. J. Hamblen, for the Crown, was not called on to argue.

HUMPHREYS, J.: This is an appeal on a question of law against a conviction, leave to appeal having been granted by the single Judge in order that this Court might consider the questions raised by the grounds of appeal.

The conviction was for obtaining money by false pretences. There were in fact nine separate cases in which the same procedure was adopted. The appellant issued an advertisement in the paper which is popularly supposed to circulate principally amongst licensed victuallers, in this form: "Dartboards. Actual maker can now accept limited number of orders; selected elm; rustless steel wires; double-sided; guaranteed N.D.A."—that is, National Darts Association—"specification; £1 carriage paid; state whether trebles, clock or fives. J. Sullivan". In answer to that advertisement a number of persons, of whom nine were named in the indictment, sent in their money either for one dartboard or for more than one. It was common ground that the dartboards were not supplied, and the question for the jury was whether the appellant had obtained those sums of money by false pretences.

In order that a person may be convicted of that offence it has been said hundreds of times that it is necessary for the prosecution to prove to the satisfaction of the jury that there was some misstatement which in law amounts to a pretence, that is, a misstatement as to an existing fact made by the accused person; that it was false and false to his knowledge; that it acted upon the mind of the person who parted with the money, and that the proceeding on the part of the accused person was fraudulent. That is the only meaning to be applied to the words "with intent to defraud".

In this case, the jury having convicted, Mr. Fitzwalter Butler, who defended the appellant at the trial, and has

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appeared here, has taken two points. He says: "In this case I do not deny that there was a statement made by the appellant which might be a false pretence in law; it was a statement of actual fact, the charge in every count in the indictment being the same, that at the time when he issued the advertisement he, John Sullivan, was an actual maker of dartboards. There is no doubt about that, and there is no doubt that he got the money in each case, but I say that there was no evidence to go to the jury that it was the making of that false pretence which induced the persons who parted with their money so to part with it; it may have been something else which the prosecution have not proved". Nothing in this judgment must be taken to whittle away in the smallest degree the well-known rule that the prosecution must prove the matter last-mentioned. At the trial the first witness who was called was going to be asked, it seems to us, the very question, what induced him to part with his money, in some form or other, but it appears that as soon as he was asked the question in this form: "What did you think when you saw that advertisement?"—which was not a very good way of putting it, though it is easy enough for anybody to understand what was intended—Mr. Fitzwalter Butler objected by using the word "Well", and the learned counsel for the prosecution said: "My learned friend objects; I will leave that". Thereafter, no question was put by counsel for the prosecution to any of these witnesses as to his reason for parting with his money or as to what effect upon his mind the advertisement had, a very relevant and necessary question. One or two were asked by the learned Deputy-Chairman, who was sitting as Chairman, with the result that the witness gave as his reason for parting with his money what a witness of that character might be expected to say: "Because I wanted the dartboards, of course". It does seem to the ordinary person to be the usual common-sense answer, and none of the witnesses was asked by anybody the simple question: "Did you believe what was stated in the advertisement and, believing it, did you send this postal order or cheque?" That was the state of the evidence,

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except that the defendant, the present appellant, when he gave evidence on oath, said that he did not mean to represent that he was an actual maker of dartboards, and that all he meant to represent by his advertisement was that he intended to become a maker of dartboards having been in the past a maker of dartboards in the sense that years ago, certainly before this war started in 1939, he had made some dartboards as an amateur and had sold them to some of his friends. The jury did not believe that.

It is, we think, undoubtedly good law that the question of the inducement acting upon the mind of the person who may be described as the prosecutor is not a matter which can only be proved by the direct evidence of the witness. It can be, and very often is, proved by the witness being asked some question which brings the answer: "I believed that statement and that is why I parted with my money"; but it is not necessary that there should be that question and answer if the facts are such that it is patent that there was only one reason which anybody could suggest for the person alleged to have been defrauded parting with his money, and that is the false pretence, if it was a false pretence. We are inclined to think this is one of the cases in which that rule applies, for all the nine persons named in the indictment were complete strangers to the appellant. They saw an advertisement, and it is quite plain that, having read the advertisement, they sat down at once and sent their £1 to the appellant. What conceivable reason could there be for parting with their money except the language of the advertisement, and the language of the advertisement begins with the words "Actual maker"? We think, therefore, that there was evidence upon which the jury, upon a proper direction, could find that the defendant did represent himself as the actual maker of dartboards, and that it was the representation that he was an actual maker of dartboards who was in a position as the actual maker to send a dartboard in return for a pound that induced these persons to part with their money. Therefore, without saying for a moment that the best possible course was followed in this

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case in the examination of the witnesses, we are of opinion that there was evidence upon which a jury could find that the false pretence which was alleged was the inducement which operated on the minds of the persons who parted with their money.

The second point taken by Mr. Fitzwalter Butler is this; he said: "At least the learned Judge in directing the jury," in what Mr. Fitzwalter Butler has agreed, and we think, was a very careful summing-up, "did not deal with that essential element of the matter". Suffice it to say that in our opinion he dealt with it sufficiently. He was meticulously careful to explain to the jury that they must not convict merely because people had sent money and had not got something in return. There are several passages in this summing-up which we think are admirably designed to make it clear to the jury exactly what their duties were in the matter. Upon the one most important matter on which most cases of false pretences turn, namely, intent to defraud, a most admirable direction was given to the jury, in these terms: "You have also been told, and, it seems to me, quite accurately, what the offence consists of. It consists of obtaining money, in this case money or postal orders, by making false representations, that is to say, statements of fact which are untrue, which are untrue to the knowledge of the defendant when he makes them, and which induced a person to part with his money—money obtained by that false statement or false pretence—and there must be an intention to defraud. Now the intention to defraud you very often have to infer from the circumstances; that is to say, you do not expect a person who is going to commit an offence of this sort to sit down and write on a piece of paper "I intend to defraud"; but if you think the circumstances are such that the statements which were made in relation to these nine charges are statements which are untrue, and were made with the intention of obtaining money, and the subsequent explanations which were made, and so on, lead you to infer that his intention in making those statements can only have been to deceive and to obtain money, then you can draw the inference that his intentions were to defraud". No lawyer could criticise that

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direction to the jury in a case of obtaining money by false pretences.

Those are the only points which have been made here by the learned counsel, and in our opinion it is impossible to say that there was in this case that which would have to be proved before we could interfere in this matter, namely a miscarriage of justice, and the appeal is dismissed. There is no appeal against sentence.

Appeal dismissed.

CIRCUIT CASE (MIDLAND CIRCUIT).

NORTHAMPTONSHIRE WINTER ASSIZES.

BEFORE

MR. JUSTICE LEWIS.

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JAMES McMINN.

Plea—Autrefois Convict—Outstanding Offence Taken into Consideration—Conviction of Main Offence Quashed—Subsequent Prosecution for Outstanding Offence—Validity of Plea.

Where upon the conviction of a prisoner an outstanding offence has been taken into consideration by the Court at his request, and the conviction for the main offence has been quashed on appeal and the prisoner has then been prosecuted in respect of the outstanding offence, he can establish a plea of *autrefois convict.*

The defendant was indicted before Lewis, J., on January 24, 1945, at Northamptonshire Assizes for obtaining a cheque by false pretences. On being arraigned he entered a plea of *autrefois convict.* Evidence was called to prove the following facts. On September 26, 1944, the defendant appeared before the Stratford (Essex) Petty Sessional Court charged with larceny. He consented to be dealt with summarily and the Justices found the offence proved. He then asked

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that an outstanding offence of obtaining the cheque by false pretences in Northamptonshire, in respect of which he had signed the usual "other offences" form, should be taken into consideration. The Justices agreed to take it into consideration, and passed a sentence of six months' imprisonment. The defendant appealed to Essex Quarter Sessions against the conviction of larceny, and on November 30, 1944, Quarter Sessions allowed the appeal and quashed the conviction. The defendant was then arrested on warrant for the offence of obtaining the cheque by false pretences and committed to Northamptonshire Assizes for trial.

A. P. Marshall, for the defendant.

Before an outstanding offence can be taken into consideration, the defendant must admit in open Court that he is guilty of the offence, and it is always open to the prosecution to object to the offence being taken into consideration. The Court, moreover, has always the power to refuse to take outstanding offences into consideration, but, in my submission, ought not to refuse except for real or exceptional reasons, the general object aimed at being that of giving the defendant a clean sheet when his sentence is served. The defendant's admission of guilt in open Court of the offence with which he is now charged amounted to a conviction on his own confession. SHERIDAN, 26 Cr. App. R. 1; [1937] 1 K. B. 223 is an authority for the proposition that there can be a conviction without any sentence being passed, and R. *v.* DURHAM JUSTICES; *ex parte* LAURENT, [1945] 1 K. B. 33 is an authority for the proposition that "conviction" does not always presuppose a formal arraignment and may have a narrower meaning than a conviction following a plea of guilty, or finding of guilt by a jury or Court. As the defendant has already been in peril in respect of the offence with which he is now charged by reason of the fact that he ran the risk of having an increased sentence imposed on him on account of it, it is against the general principles of the

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criminal law that he should be again proceeded against in respect of the same offence.

T. R. Fitzwalter Butler, for the Crown.

The plea cannot be established, inasmuch as there has been no conviction in respect of the offence of obtaining money by false pretences. The practice of taking outstanding offences into consideration appears to date from a circular sent to police authorities by the Home Secretary in 1896. That is referred to in SYRES (1908), 1 Cr. App. R. 172. In McLEAN, 6 Cr. App. R. 26; [1911] 1 K. B. 332 the prisoner was subsequently prosecuted in respect of an outstanding offence which had been taken into consideration, and nobody even suggested the possibility of a plea of *autrefois convict*, or that the procedure was bad in law. The Court of Criminal Appeal merely reduced the sentence. [Lewis, J.: The prisoner was not defended, and on the appeal he was not represented.] The right of the Crown to prosecute subsequently for the outstanding offence which had been taken into consideration was, however, never questioned. Again in Fox (1925), 18 Cr. App. R. 192 the Court of Criminal Appeal appear to have regarded it as generally a matter for the discretion of the prosecution whether they would in circumstances such as the present proceed again in respect of the outstanding offence or not, though they intimated that in that particular case the prosecution would probably decide not to proceed. In BLABY, [1894] 2 Q. B. 170, at p. 172, Hawkins, J., in delivering the judgment of the Court for Crown Cases Reserved, said "conviction merely referred to a plea of guilty by the accused or the finding of guilty by a jury". Conviction of any offence presupposes an arraignment in respect of that offence.

Further, although it is not necessary in order to establish a conviction that the conviction should have been followed by sentence, conviction of an offence presupposes that there is the power to impose an independent sentence in respect of that offence. In the case of outstanding offences there is no such power, nor can a comprehensive sentence greater than

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that warranted by law for the basic offence be imposed. [He referred to TREMAYNE (1932), 23 Cr. App. R. 191 and HOBSON (1941), 29 Cr. App. R. 30.] The fact that a prisoner admits his guilt in open Court in respect of an outstanding offence is merely one of the surrounding circumstances to which a Court is entitled to have regard in passing sentence on the basic offence, as is the fact that the prisoner has a bad general record or is of unblemished character.

LEWIS, J.: I have considered the point of law and I think that the plea in bar of *autrefois convict* succeeds. I shall direct the jury to return a verdict that the prisoner has been previously convicted. I have been referred to several cases, but I do not think there are any on all fours with this one. On considering the principle laid down, I think it is my duty to direct the jury to find that the prisoner has been previously convicted. I am very grateful to you, Mr. Butler, for your assistance. [His Lordship then directed the jury:] Members of the jury, you have listened to a long legal discussion about this case. The defendant, as you know, is charged with an offence to which he has not yet pleaded, because, by the procedure of this Court, if there is any objection to be taken by his counsel, it is right that the objection should be taken before the defendant is asked whether he is guilty or not guilty. The discussion is based on the evidence which you have heard that the defendant in October, 1944, was before a petty sessional Court on a charge of larceny. He could, if he had desired, have elected to be tried by a jury, but he said that he was quite prepared to let the magistrates deal with his case. The magistrates did so, and ultimately found that the charge of larceny was proved. Before he was sentenced, the defendant asked that another offence, an offence of false pretences, should be taken into consideration. The magistrates approved that course. The defendant admitted the other offence, and it was taken into consideration when he was sentenced. An appeal by the defendant to quarter sessions against his conviction was allowed, and the conviction and sentence imposed on the

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defendant were accordingly quashed. Then the authorities thought it right to proceed against the defendant for the offence of false pretences, with which he had never been formally charged, but which he had admitted before the magistrates and which he had asked them to take into consideration when they sentenced him on the charge of the larceny.

The discussion which you have heard was whether by reason of those facts, which were not disputed, there has been a conviction of the defendant in respect of the offence for which he has been brought up at these Assizes. It is a principle of English law that no man should be twice punished (I use that word advisedly) for the same offence. That is the ordinary way of putting it. The true question is whether or not a man shall be put in peril of punishment on more than one occasion for the same offence. A man when he is brought before the magistrates is in peril of being convicted and, if convicted, of being sent to prison. When a man has been tried already and has been acquitted by magistrates, or at quarter sessions, or at Assizes, he is entitled, before he pleads to the charge, to enter what has been called since early times a plea of *autrefois acquit*, which means that he has been previously acquitted, because no man can be tried again for the same offence. Similarly, if a man has been convicted of an offence once, he cannot be tried again for the same offence. He is entitled, if he is charged again, to enter a plea of *autrefois convict*, which means that he has already been convicted of the offence and cannot be tried for it again.

You have heard the discussion on the law as to what exactly a conviction means, and you have been sworn as a jury to try whether the prisoner at the bar was duly convicted of the offence in the form set out in the indictment, and a true verdict give according to the evidence. You have to say, by your verdict, whether the defendant has already been convicted of this offence. You have to take the law from me. You are the judges of fact, but there are no facts to judge in this case, because every fact is conceded by both sides, and it is a

matter of law whether or not the facts are such as to amount in law to a previous conviction for the same offence. As a matter of law I tell you that they do, and therefore, under my direction—and it is my responsibility—I ask you by your verdict to say that the defendant has already been convicted of the offence with which he is charged, and therefore cannot be tried again. Will you, through your foreman, be good enough to say that you find that the defendant has already been convicted.

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[The jury returned a verdict: "We find that the defendant has already been convicted of the offence charged", and the Judge ordered that the defendant should be discharged.]

Solicitors: Dennis, Faulkner and Alsop, Northampton, for the defendant.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE WROTTESLEY AND MR. JUSTICE CROOM-JOHNSON.

JOHN CANNY.

1945. 26 *February.*

Defence of Prisoner—Right to Put Forward—Deprivation of Right by Judge owing to Misunderstanding—Conviction Quashed—Legal Aid—Case where Inquiry into Prisoner's Medical History or Mental State Desirable—Duty of Justices.

Conviction quashed on the ground (*inter alia*) that the prisoner had been deprived by the Judge of the opportunity of properly putting his defence before the jury owing to the Judge's misreading of a medical report.

Observations on the duty of Justices to grant legal aid in a case where it appears that inquiries into the prisoner's medical history or mental state are desirable.

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JOHN CANNY.

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Appeal against conviction.

The appellant was convicted at Hampshire Assizes on December 12, 1944, of wounding with intent to do grievous bodily harm, and was sentenced by Macnaghten, J., to eighteen months' imprisonment.

At the trial a medical report relating to the appellant was before the Judge. Owing to a misreading of this report, the Judge at the outset of the trial, in the hearing of the jury, intimated to defending counsel that he could not resist conviction, and in his summing-up in effect told the jury that the appellant ought to have been advised to plead guilty and that there was in substance no defence for them to consider. He further directed the jury that their only choice lay between a verdict of guilty and not guilty, and did not refer to their power to convict of unlawful wounding.

G. W. Willett, for the appellant.

The appellant was in effect deprived of his right of putting his defence before the jury. The Judge in his summing-up never left the defence to the jury at all, but in effect told them that there was no defence for them to consider. [He was stopped.]

W. Maitland Walker, for the Crown.

The manner in which the Judge at the trial dealt with the defence cannot be supported, but it is submitted that this is a case where on a proper direction the jury must certainly have convicted and the Court is asked to consider whether the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should not be applied.

HUMPHREYS, J.: This is an unfortunate case in which the result is that, in our view, it becomes necessary to quash the conviction, although we have not a shadow of doubt that the jury, properly directed, would have convicted the appellant of something. The appellant was charged with wounding his wife with intent to do her grievous bodily harm, and it was open to the jury on such a charge to convict

either of that offence or of the lesser offence of unlawful wounding. The learned Judge, owing to an oversight or momentary forgetfulness, directed the jury that they could not find a verdict of unlawful wounding, his statement to them being: "If you wish, you may retire to your room, or you may be of one mind now. You have only a choice of guilty or not guilty". That, quite clearly, is contrary to law, and it would in any event have been necessary to quash the conviction on that count on that ground.

There is, however, another difficulty which has been raised by Mr. Willett, who appeared for the appellant both at the trial and in this Court, namely, that the appellant was not tried by the jury at all, because the learned Judge having formed a view owing to his misreading of the medical report which was before him, throughout adopted the attitude that the accused man was a person who suffered from delusions. If he suffered from delusions to the extent of being insane, that is one matter, and in that event he ought not to have been convicted of anything at all, but ought to have been found guilty but insane. But in point of fact the medical report was to the effect that he did not suffer from delusions but was very unstable, and a person who was to some extent a danger to society because he was likely, particularly if he got some drink, to commit violence, though thoroughly capable of understanding what he was doing. The unfortunate result of the Judge's misunderstanding of the medical certificate was that in effect he took away from the jury the right of trying the prisoner and at the very outset of the proceedings said, in the hearing of the jury, to defending counsel: "Are you resisting a conviction on the charge of wounding? . . . I have read the depositions, which make it clear that the woman was wounded, and there is no dispute as to who inflicted the wound". Counsel said all that he could say in the circumstances: "But there is a dispute; I am saying my client did not". Then the learned Judge said: "Well, it is for you to see if you can persuade the jury". That, of course, was not so, the onus

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is always on the Crown, and that was an unfortunate way of putting the matter. When the learned Judge came to deal with the matter later, he most unfortunately, not having in his mind the words of the medical report, insisted on dealing with the whole case as one in which the time of the jury had been wasted because of the defence, which undoubtedly was a childish defence and one with which the jury might have been trusted to deal. The learned Judge unfortunately treated the matter as if the prisoner had no right to be tried at all because he suffered from delusions, and therefore ought to have been told to plead guilty and suffer such punishment as the Judge thought fit to award him.

There are many decisions of this Court, and, indeed, many decisions before the existence of this Court, to the effect that in England a man is entitled to a fair trial by jury on any offence which is indictable. It does not matter how absurd the defence is, or how unlikely it is that any sensible person would pay the least attention to it. A prisoner is entitled to make his defence to the jury, and it is for the jury and not for the Judge to decide on its weight. The Judge has no power to stop a defence and say: "This is an absurd defence and I will not let you put it before the jury". When we find that the learned Judge, owing entirely to the initial mistake, has really prevented the jury from trying the prisoner fairly and squarely on the evidence by repeating over and over again: "This is an absurd defence, there is no foundation for this allegation against his wife, and the truth is, as you will find in a minute, that the prisoner did assault his wife", that is not a trial at all according to our methods and understanding. It is a mistrial. We find it quite impossible to say, if this incident had not happened and if the jury had been properly directed, what they would have done, and we cannot speculate. What we do know is that the law of this country is that a prisoner is entitled to take his chance of finding a stupid jury and is entitled to put his defence before the jury with a view to persuading them to acquit him. If the

appellant was advised by his counsel to plead not guilty, or if in spite of the advice of his counsel he said: "I insist on being tried and on going into the box to tell my story", he was entitled to do so. We think it right to say, further, that there is no foundation whatever for the reflection which was unfortunately made by the learned Judge on counsel in this case. We find that Mr. Willett did his duty as an independant and courageous member of the Bar should do. Finally, we are not satisfied that the jury must have convicted if this unfortunate incident had not occurred, and therefore we must quash the conviction.

There is one other matter to which reference should be made, and that is, that the learned Judge took a strong view that the defence in this case was so absurd that, on it being disclosed, the justices who granted legal aid were wrong in doing so. We have the misfortune again to differ from the learned Judge on that point. If the medical report which is before us was before the justices, it would have been apparent to them that this was a case in which careful inquiries should be made into the medical history and the state of mind of the accused person. We can conceive of no better ground for granting legal aid than that, and we have no doubt that the justices granted legal aid, not in order to make it easier for the accused person to put forward an absurd defence, but in order that others might do what he could not do for himself, that is to say, obtain skilled assistance as to the state of his mind, which might assist the Court, and in order that the Court might be further assisted by counsel putting forward any defence based on insanity or certifiability.

Conviction quashed.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE CROOM-JOHNSON AND MR. JUSTICE LYNSKEY.

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5 *March.*

FREDERICK SMITH GRUBB.

Sentence—Concurrent Sentence—To be Pronounced in Open Court.

Where the effective sentence has been passed on a prisoner on one or more counts of an indictment, and there is another count on which it is desirable to pass a concurrent sentence, such sentence should be pronounced in open Court in the presence of the prisoner, even although it is not anticipated that the concurrent sentence will have any effect on the length of sentence which the prisoner will have to serve.

Application for leave to appeal against sentence.

The applicant pleaded guilty at Derbyshire Assizes on November 15, 1944, to three counts of an indictment charging him respectively with inflicting grievous bodily harm, assault occasioning actual bodily harm, and assault with intent to commit rape and was sentenced by Wrottesley, J., to three years' penal servitude.

No counsel appeared on either side.

HUMPHREYS, J.: The applicant pleaded guilty at Derbyshire Assizes to three counts of an indictment all referring to the same matter. The first count charged him with inflicting grievous bodily harm, the second with an assault occasioning actual bodily harm, and the third with an assault with intent to commit rape. Persons who are not acquainted with the confusion into which sentences have got in this country may be surprised to learn that an assault with intent to commit rape is not punishable by nearly as heavy a

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sentence as an assault occasioning actual bodily harm. The first two counts in the indictment are punishable with a maximum sentence of five years' penal servitude, and the third only with a maximum sentence of two years' imprisonment.

The learned Judge in this case passed a sentence of three years' penal servitude on the first two counts, and it is said that he passed a concurrent sentence of two years' imprisonment on the third count. We have before us the transcript of the shorthand note, and from beginning to end there is no indication that the learned Judge said anything about a concurrent sentence of two years' imprisonment. Having some acquaintance with the extremely experienced Clerk of Assize of the Midland Circuit, we have no doubt that what happened was that, after he had passed the sentence of three years' penal servitude, the learned Judge was informed that it was usual to pass some sentence on the remaining count of the indictment, and that such sentence might be concurrent and therefore would have no effect, so far as the prisoner was concerned, on the length of sentence he would have to serve, and that in those circumstances the learned Judge directed the sentence of two years' imprisonment to be entered on the record. We desire to observe that in future it is right and proper that any sentence pronounced by a Court should be pronounced in open Court and it would have been better if the learned Judge had said in terms—if necessary, directing that the prisoner be brought up again for the purpose: "I also pass on you on the third count a sentence of two years' imprisonment to run concurrently with the other sentence". The reason why such a course is eminently desirable is that in other circumstances this Court might find it necessary for some reason or other to quash the sentence on the first two counts, and it would appear from the shorthand note that the prisoner would be entitled to be discharged because there would be no record of his having been sentenced on the remaining count. Concurrent sentences should be imposed in open Court. In this case it makes no difference whatever.

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because the applicant was in effect sentenced to three years' penal servitude, and in our opinion he thoroughly deserved that sentence. [His Lordship then referred to the facts of the case.] The application for leave to appeal against sentence is refused.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE TUCKER.

EILEEN DIBLE.

1945.
26 *March.*

Borstal Detention—Committal to Quarter Sessions for Sentence—Condition Precedent—Two Convictions not Essential—Discharge on Probation—Failure to Observe Condition of Recognisance—Conviction then Recorded—Sufficiency to Found Jurisdiction—Criminal Justice Administration Act, 1914 (*4 & 5 Geo. 5, c. 58*), *s.* 10.

In order that magistrates may have jurisdiction to commit an offender to quarter sessions with a view to his being sentenced to detention in a Borstal institution, it is not necessary that two convictions should always be recorded. Where the offender has previously been discharged on probation and, having failed to observe a condition of his recognisance, has been brought back before the magistrates who then record a conviction, the requirements of section 10 of the Criminal Justice Administration Act, 1914, on this matter are complied with, and the magistrates are in such cases entitled to commit the offender to quarter sessions for sentence, provided that they are satisfied that the other requirements of the section as to criminal habits or tendencies, etc., are fulfilled.

Application for leave to appeal against sentence.

On February 16, 1945, it was proved at the County of London Sessions, where the applicant appeared for sentence under section 10 of the Criminal Justice Administration Act, 1914, that she had been discharged on probation on September 21, 1944, and had subsequently broken the recognisance entered into by her and had been brought back before the magistrate, who then recorded a conviction against her, and committed her to the sessions for sentence. The Deputy Chairman ordered that the applicant be detained in a Borstal institution for a period not exceeding three years.

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No counsel appeared on either side.

TUCKER, J.: The applicant was committed to quarter sessions with a view to being sentenced to detention in a Borstal institution if the Court thought fit to act under the provisions of section 10 of the Criminal Justice Administration Act, 1914, which provides: "Where a person is summarily convicted of any offence for which the Court has power to impose a sentence of imprisonment for one month or upwards without the option of a fine, and (a) it appears to the Court that the offender is not less than sixteen nor more than twenty-one years of age; and (b) it is proved that the offender has previously been convicted of any offence or, that having been previously discharged on probation, he failed to observe a condition of his recognisance; and (c) it appears to the Court that by reason of the offender's criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime, it shall be lawful for the Court, in lieu of passing sentence, to commit the offender to prison until the next quarter sessions, and the Court of quarter sessions shall inquire into the circumstances of the case, and, if it appears to the Court that the offender is of such age as aforesaid and that for any such reason as aforesaid, it is expedient that the offender should be subject to such detention as aforesaid, shall pass such sentence of detention in a Borstal institution as is authorised by Part I of the Prevention of Crime Act, 1908, as amended by this Act; otherwise the Court shall deal with the case in any way in which the Court of summary jurisdiction might have dealt with it." That is the section under which the applicant was sent to quarter sessions to be dealt with. The point taken before the Deputy-Chairman was that the provisions of paragraph (b) of sub-section (1) had not been fulfilled. It is clear on the facts that all the other requirements of the section were complied with.

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On September 21, 1944, the applicant was adjudged guilty of three offences: One was that of being in possession of an identity card suspected of being stolen or unlawfully obtained, an offence under sections 24 and 65 of the Metropolitan Police Act, 1839; the second was that of using a name other than that by which she was ordinarily known prior to September 1939, an offence under regulation 22 of the Defence (General) Regulations, 1939; and the third was that of falsely representing that she was the person to whom an identity card related. All three offences arose out of the same transaction. In respect of the second and third she was sentenced to one day's imprisonment, and in respect of the first she was discharged on probation. She was accordingly released, but it was incumbent on her to comply with the conditions on which she had been put on probation. That she failed to do, and she was accordingly brought back before the Court of summary jurisdiction, which then recorded a conviction against her in respect of that offence, and sent her to the sessions to be dealt with under section 10 of the Act of 1914. When she appeared before the sessions her case was fully considered, and it was proved that she had broken a condition of the probation order by running away from the remand home to which she had been sent. That was the breach of recognisance for which she had been brought back before the Court of summary jurisdiction.

The point taken before the Deputy Chairman was that she could not be dealt with under section 10 because she had not been previously convicted, and that there must always be two convictions before a person can be dealt with in that way, the conviction recorded when he is committed for sentence and some conviction prior to that. But it appears to us that that contention is contrary to the express words of the section " or, that having been previously discharged on probation, he failed to observe a condition of his recognisance ". That is what had happened in this case. The applicant had previously been discharged on probation, and subsequently to that she failed to observe a condition of her recognisance which she

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had entered into on that occasion, and she therefore appears to come fully within the terms of the sub-section.

I had to deal with a precisely similar point in MARTIN *v.* NOLAN AND ANOTHER (1944), 60 T. L. R. 558. The matter arose there in this way. A libel action was brought by a clerk to justices against the first defendant and a newspaper for stating that he was an incompetent clerk, and one of the matters in respect of which it was alleged that he had shown his incompetence was in advising his bench in circumstances precisely similar to those of the present case to send the case to the appropriate quarter sessions with a view to Borstal detention. At quarter sessions the Recorder held that he had no jurisdiction to deal with the matter, and thereupon the newspaper commented in strong language on the incompetence of the clerk to the justices who had allowed such a case to be sent to quarter sessions. When the libel action came on for hearing, I ruled that the clerk to the justices had come to a proper decision in the matter and that it was the Recorder who had erred, and I gave judgment to that effect and dealt with the matter at some length. My decision in that case, by virtue of the fact that my Lords now concur in it, has therefore become a decision of the Court of Criminal Appeal.

Apart from that point, which was the point argued by the applicant's counsel at quarter sessions, the applicant herself puts forward certain contentions why she should not have been sentenced to Borstal detention. She says that the reason why she absconded from the hostel was that there was a girl there who was not friendly to her and made her unhappy and she asks to be given another chance. We have considered all the circumstances of the case and on the merits we consider that the order for detention in a Borstal institution made by the Deputy Chairman was a proper one, and therefore the application is refused.

Application refused.

BEFORE

MR. JUSTICE SINGLETON, MR. JUSTICE WROTTESLEY AND MR. JUSTICE TUCKER.

JOHN McGREGOR.

1945. 16 *April.*

Breach of Recognisance—Procedure—Precise Breach Alleged to be Stated and Proved—Opportunity of Answering Allegations to be Afforded—Instruction of Counsel.

Where a prisoner appears before a Court in respect of an alleged breach of recognisance, he should be informed precisely what is the breach alleged and such breach should be proved by precise evidence. The prisoner should also be asked whether he desires to give evidence, or to make a statement from the dock, with regard to the breach alleged and whether he has any witness whom he wishes to call.

It is proper and desirable that counsel should be instructed for the prosecution in such cases.

PINE (1932), 24 Cr. App. R. 10, followed.

Where a prisoner is bound over and is at the same time placed on probation, or where any condition is attached to the binding over, a full and clear endorsement to that effect should appear on the indictment.

Appeal against sentence of fifteen months' imprisonment with hard labour passed by the Chairman of the County of London Sessions, where the appellant appeared on January 25, 1945, in respect of an alleged breach of recognisance.

In October, 1944, the appellant, John McGregor, pleaded guilty at the County of London Sessions to offences of shop-breaking and was bound over under probation for two years. On January 25, 1945, he appeared again before the sessions in respect of an alleged breach of recognisance. On that occasion no counsel appeared in the case, but a probation officer went into the witness-box and gave evidence that the appellant had been assisted with money and clothing, but had failed to take up employment, and that he had been associating with a woman named Myers (who was frequently before the Court) and

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was now before the Court on a breach of a probation order. In answer to a question from the Chairman, the probation officer said that the appellant had not been in trouble previously. After another probation officer had given evidence with regard to Myers, the appellant was asked if he wished to ask any questions of the probation officer who had given evidence in his case, and said that he did not. The Chairman then said: "You, McGregor, must go to prison for fifteen months with hard labour."

Hendry White, for the appellant:

The procedure at the sessions was quite irregular and the appellant was given no opportunity of answering the allegation.

No counsel appeared for the Crown.

TUCKER, J.: The proceedings appear to us to have violated in many respects what has been laid down in this Court to be the proper procedure to be followed on these occasions. It is to be observed, in the first instance, that the appellant was never told precisely what was the breach of recognisances alleged against him. He was not told what it was he had been bound over to do and in what way it was alleged that he had failed to comply with his promise. Then the probation officer, when called into the witness-box, did not give any precise or clear evidence as to the nature of the breach which was alleged against the appellant. Furthermore, and most important of all, perhaps, the appellant was never asked whether he desired to give evidence about this matter and explain his conduct with regard to the alleged breach, nor was he asked whether he had any witness to call nor was he asked whether he wished to give any explanation from the dock where he stood.

All those are elementary matters of procedure going to the root of the administration of justice, which have been referred to on more than one occasion by this Court. They were dealt with by Avory, J., in PINE (1932), 24 Cr. App. R. 10, at p. 13, where, after dealing with the question whether or not there had been sufficient evidence of the breach of the recognisance,

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he said: "In our opinion, even assuming that there was any proper evidence of the conviction at Acton Petty Sessions and of the alleged breach of recognisance—which is at least doubtful—this conviction cannot stand, in view of the fact that the appellant had no opportunity of making any answer to the allegation that he had committed a breach of his recognisance. On that ground the order for detention in a Borstal institution must be quashed." Earlier on in his judgment he had drawn attention to the fact that "there does not appear to have been any charge that he had broken the terms of the recognisance". The matter was again before the Court in LEWIS, February 1942 (unrep.), in which Cassels, J., giving the judgment of the Court, said: "For that reason he was brought once more before the Court of quarter sessions for Essex, where the learned Deputy Chairman, dealing with this matter, listened to the evidence upon one side. True, he gave this young man an opportunity to cross-examine, but omitted altogether to give the appellant any opportunity of going into the witness-box to deal with the allegations of so-called misbehaviour himself, or to say upon oath, as he doubtless could have said, what really had taken place. In the meantime, let it be borne in mind, it was eighteen months after he had been bound over, and the offence for which originally he had been bound over was that of stealing a few shillings from the gas meter in his father's house. In those circumstances, the learned Deputy Chairman and the justices who were sitting with him, without giving him the opportunity to explain upon oath what it was that happened, came to the conclusion that this was a case where this young man required the discipline which is usually associated with three years' residence in a Borstal institution." In that case the Court quashed the sentence on the ground of the failure to carry out an essential part of the administration of justice.

There is another matter to which the Court desires to draw attention, namely, that in this case no counsel appeared to present the case before the Court on behalf of the prosecution. In our view, it is right, proper and desirable that in cases

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of this kind where prisoners are brought before the Court for breach of recognisance, just as in cases where people are sent under section 10 of the Criminal Justice Administration Act to be dealt with as suitable for Borstal treatment, counsel should be instructed so that they can make proper inquiries into the matter and lay the case before the Court in the way in which it should be laid. In these circumstances, this sentence is quashed.

I desire to add one other observation. We have before us the original indictment in this case showing the order that was made when the appellant first pleaded guilty to offences of breaking and entering. We observe endorsed upon that indictment the fact that the prisoner was bound over in the sum of £5 for two years' concurrent, but there is nothing on this indictment to indicate that he had been placed upon probation or that any particular condition had been attached to that binding over. That should be done in all cases where that course is taken.

On further reference to the indictment, I observe that what is written is: "Bound over £5, two years, Cummings." It appears from the shorthand notes that Mr. Cummings is the probation officer, and that, no doubt, was an abbreviation which would be intelligible to the clerk of the peace, but we think it desirable that indictments should be endorsed rather more fully than that.

Sentence quashed.

BEFORE

MR. JUSTICE SINGLETON, MR. JUSTICE WROTTESLEY AND MR. JUSTICE TUCKER.

GEORGE THOMAS JOHNSON.

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Indictment—Duplicity—Prevention of Crime—Waiting for Opportunity to Commit Offence—Two Places Named in One Count—Alternative Charge not Disclosing Previous Conviction Available—Procedure to be Followed—Prevention of Crimes Act, 1871 (34 & 35 *Vict. c.* 112), *s.* 7.

Section 7 of the Prevention of Crimes Act, 1871, provides: "Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes, be guilty of an offence against this Act, and be liable to imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstances or any of them. . . . Thirdly. If he is found in any place, whether public or private, under such circumstances as to satisfy the Court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction."

The particulars of offence alleged that the appellant and another man were "found in certain public places, namely, Elm Tree Road and Circus Road, in the county of London, waiting for an opportunity to commit an offence punishable on indictment, namely, housebreaking with intent to steal". Elm Tree Road and Circus Road were roads adjoining each other.

Held, that the form of the indictment was one which was not to be approved, and that an indictment in such a case ought to follow the language of the statute and allege one place only. In the circumstances of the particular case, as the two roads adjoined each other, the indictment was not bad in law for duplicity.

Held, further, that, as the facts of the case were such that the appellant might equally have been charged with two offences, namely the one (with which he was charged) which

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involved proof to the jury that he was of bad character, and the other (attempted housebreaking) which involved no such proof, the latter charge should have been selected by the prosecution.

GOODWIN (30 Cr. App. R. 23; [1944] K. B. 518) followed.

Appeal against conviction.

The appellant was convicted at the County of London Sessions of waiting for an opportunity to commit an offence, contrary to section 7 of the Prevention of Crimes Act, 1871, and was sentenced by the Chairman to twelve months' imprisonment with hard labour.

The appellant was indicted with a man named McFarlane, and the particulars of offence alleged that each prisoner had been convicted previously after a previous conviction for crime, and that the prisoners "were within seven years immediately after the sentence passed upon them respectively for the last of such respective crimes, to wit, on December 28, 1944, found in certain public places, namely Elm Tree Road and Circus Road in the County of London, waiting for an opportunity to commit an offence punishable on indictment, to wit, housebreaking with intent to steal". It was proved that the two roads named adjoined each other. During the trial defending counsel took the objection that the indictment was bad in that it alleged two separate offences in one count, but the Chairman overruled the objection. The appellant and his co-prisoner were both found guilty.

Alban Gordon, for the appellant:

The indictment was bad in law, in that it alleged two separate offences in one count. One offence was charged as having been committed at Elm Tree Road and another at Circus Road. These should have been the subject of separate counts, and the Chairman should have acceded to the motion on behalf of the prisoner that the indictment in the form in which it was preferred should be quashed. Secondly, the evidence for the prosecution did not show that the appellant was waiting for an opportunity to commit an offence, which

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was the crime charged; the evidence, if accepted, showed that he had gone beyond that stage. The evidence was that he was trying to open doors with keys, that is to say, was attempting to commit a crime, and that is the charge which should have been made against him, especially in view of the observations of Humphreys, J., in GOODWIN (*supra*), that where two possible charges are open to the prosecution, one of which involves disclosure to the jury of the fact that the prisoner has been previously convicted and the other does not, the latter should be preferred.

Sir Reginald Blaker, for the Crown:

Although the form of the indictment may be open to objection, it was not bad in law. One offence only was charged against the appellant, that he was waiting for an opportunity to commit an offence. The evidence showed that he was waiting for that opportunity all the time during which he was in both Elm Tree Road and Circus Road. The evidence of the police officers clearly established that the appellant was guilty of the crime charged, though it may also have established that he was committing another crime. It is a matter for regret that more attention was not paid to the observations of Humphreys, J., in GOODWIN (*supra*), before this indictment was framed, and it is to be hoped that those observations will be followed precisely in future.

SINGLETON, J.: There are three grounds of appeal. The first is that the indictment was bad for duplicity in that it alleged two separate offences in one count. That raises a somewhat difficult matter. It is highly technical and it would seem to be a matter for regret, if the appellant was proved to be guilty, that still the indictment had to be quashed on this ground. It would be still more regrettable because of what took place in this Court only twelve months ago. In April, 1944, this Court had before it the appeal of one William Goodwin, 30 Cr. App. R. 23; [1944] K. B. 518, under the same section of the Prevention of Crimes Act, 1871, the main difference being that in that case the material part of the

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charge was that the appellant was found in certain public or private places, to wit, Portsea Hall and Clifton Court in the County of London, in such circumstances as to satisfy the Court before which he was brought that he was about to commit an offence punishable on indictment, namely, larceny. In the course of the judgment of the Court in that case Humphreys, J., said at pp. 30 and 521 of the respective reports: "No point was made at the trial and no point or objection was raised on this appeal regarding the fact that the appellant seems to be charged in that indictment with two offences, inasmuch as it is alleged that he was found at two separate places, in each case in such circumstances as to satisfy the Court that he was about to commit an offence." The evidence in GOODWIN (*supra*) was that the appellant, who was known to the police, was watched by police officers; that he was seen to go to a block of flats called Portsea Hall where he went up to the second floor, examined the locks of two of the doorways there, and came down again; that, having left Portsea Hall, he went to Maida Vale and examined the locks and door of a block of flats called Clifton Court, and that he was arrested very soon after reaching the street on leaving that block. It would seem from the report of the facts in that case that the two places, Portsea Hall and Clifton Court, were a considerable distance apart. The appellant, having left Portsea Hall, went into another area altogether, namely, Maida Vale, and there went to Clifton Court. The places were distinct and separate, and Humphreys, J., drew attention to this very point, but notwithstanding that, the indictment in the present case is in the same form in this respect, in that it charges that the appellant was found in certain public places, in the plural, namely, Elm Tree Road and Circus Road, waiting for an opportunity to commit an offence punishable upon indictment.

It is to be regretted that attention was not paid, when this indictment was settled, to those words of Humphreys, J. If it had been, this point would never have arisen, but as it is, time and expense have been incurred on an argument whether or not in the circumstances of this case the objection is a good

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one. The objection was taken after evidence had been given, and it is clear and undisputed that Elm Tree Road and Circus Road adjoin each other. Mr. Gordon's argument on behalf of the appellant is that this indictment is bad in that the two offences are contained in one count, and he argues that the words " found in certain public places, namely, Elm Tree Road and Circus Road " show that there has been charged one offence in Elm Tree Road and one offence in Circus Road. Having regard to the situation of the two roads, that they adjoin each other or one runs into or out of the other, we think it very doubtful indeed whether on the facts of the case that objection can be held to be good, but, over and above that, it is to be remembered that the offence which is charged is being found in certain public places waiting for an opportunity to commit an offence. It has been said on behalf of the Crown that all the time while the appellant was seen or found in Elm Tree Road and Circus Road, he was waiting for an opportunity to commit an offence. It matters not, it is submitted, that two places are named because the offence is that he was found waiting, and it is right to say, so it seems to us, that if the indictment charged the offence as taking place in St. John's Wood or in the neighbourhood of Lord's Cricket Ground, no such objection could have been taken.

Rule 9 of the rules contained in the First Schedule to the Indictments Act of 1915 provides: "Subject to any other provisions of these rules, it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any indictment, in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to." No objection could have been taken to the indictment if it had charged the offence as having been committed in St. John's Wood or in the neighbourhood of Circus Road, but whoever settled the indictment has preferred to use words of his own without reference either to the terms of the statute creating the offence or to the words of Humphreys, J., in GOODWIN'S CASE (*supra*). None the less, we think it right to say that we are

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not satisfied that this indictment is bad for duplicity. We observe that which was said by Humphreys, J., in GOODWIN'S CASE (*supra*). He did not say that in the circumstances of that case the indictment would have been bad but might have been held to be bad. On the whole we are not satisfied that this objection ought to prevail on the facts in the present case. If we were so satisfied, we should still think it right to have regard to the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

In THOMPSON, 9 Cr. App. R. 252; [1914] 2 K. B. 99, which was a case heard by a full Court of five Judges, the headnote in the Criminal Appeal Reports says: "An objection to a count as bad for duplicity, or to the number of counts as embarrassing, must be based on the ground that the defence is likely in fact to be prejudiced by such counts, and this is a matter for the discretion of the Judge, subject to the revision of this Court, which, if that discretion is improperly exercised, will quash a conviction, whatever view it takes of the merits of the case." The Lord Chief Justice in that case, after dealing with the time at which such an objection could or should be taken, said (9 Cr. App. R., at p. 260; [1914] 2 K. B., at p. 104): "If we had thought that any embarrassment or prejudice had been caused to the appellant by the presentment of the indictment in this form, we should have felt bound to quash the conviction, whatever our views might be as to the merits of the case. It must not be thought that we are deciding that such objections should not be allowed to prevail either at the trial or in this Court. An indictment so framed might undoubtedly hamper the defence, and if it did we should give effect to the objection. There are also other objections to an indictment which must be held good at any time, as, for example, an objection on the ground of want of jurisdiction. One of the objects of section 4 was to prevent the quashing of a conviction upon a mere technicality which had caused no embarrassment or prejudice. Whilst giving the right of appeal upon any wrong decision of any question of law, the object of the Legislature was that justice should be

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done in spite of a wrong decision, and that the Court should not interfere if it came to the conclusion that, notwithstanding the wrong decision, there had been no substantial miscarriage of justice." Accordingly, in that case the Court, finding there had been neither embarrassment nor prejudice, declined to quash the conviction, even though it might be said that the indictment was bad upon the face of it. That case has been cited before this Court on different occasions, and if we had been satisfied that the objection to this indictment was sound, still we should have thought it right in the circumstances to apply the proviso to section 4, for it is perfectly clear that not the slightest embarrassment or prejudice has been caused in this case. Indeed, as I have said and as Mr. Gordon seemed to be inclined to agree in the course of his argument, if it would have been sufficient to charge this offence as taking place in St. John's Wood, the prosecution was going out of its way in naming two streets, part of St. John's Wood, where it is said the offence of being found waiting for an opportunity to commit an offence took place. For these reasons we think that the objection on the ground of duplicity fails.

The second ground and the third ground in the notice of appeal can be taken together. The second ground is: "That there was no evidence that the appellant committed the particular offence or offences named in the indictment", and the third ground is: "That the learned Chairman misdirected the jury by directing them to the effect that a person who is engaged in an attempt to commit an offence is, at the moment of and during the duration of the attempt, waiting for an opportunity to commit the said offence". Mr. Gordon's argument with regard to this was that the appellant cannot be said to have been waiting to commit an offence, or to have been found waiting to commit an offence, because he was in fact doing something else and that on the evidence he had gone beyond that stage. The evidence of the police officer was that the appellant and his companion went to two or three different places in this immediate area. It would

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appear that at times one was trying to open a door, and the natural inference if two men are together is that the other is waiting by his side at that time. The fact that a man may get beyond the stage of waiting does not, it seems to us, prevent him being indicted for that if in fact that offence has been proved. Humphreys, J., in GOODWIN'S CASE said (30 Cr. App. R., at p. 26; [1944] K. B., at p. 523): "As I have already observed, section 7 is an unusual section in that it requires that the jury shall know that the prisoner before them is a criminal and so a person likely to commit the crime with which he is being charged. In most cases it is precisely that matter about which the greatest possible care is taken to prevent the jury knowing anything. Accordingly, whenever a charge is brought against a person under section 7, the presiding Judge and everybody concerned in the case should be meticulously careful to see that the prisoner is convicted, not as the result of the appalling prejudice which must in such circumstances be brought against him, but on clear and unmistakable evidence that he committed the particular charge named in the indictment, quite irrespective of whether he has committed any other offence." The learned Judge continued: "I mention that because there is another offence with which the appellant might alternatively have been charged under the third paragraph of section 7. Following on the words that the accused must be found in such circumstances as to satisfy the Court that he was about to commit an offence are the words: 'or was waiting for an opportunity to commit . . . any offence punishable on indictment or summary conviction'. It may be in this case that there was ample evidence that the appellant was in all probability waiting for an opportunity to commit some such offence as stealing, but he was not charged with that." Indeed it is right to say that, on the facts in GOODWIN'S CASE (*supra*), Humphreys, J., pointed out that there might well be ample evidence that the appellant was waiting to commit the offence which is the charge in the present case. The learned Chairman of London Sessions at the conclusion of his address to

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the jury said: "If you have any doubt about it that these people were waiting for an opportunity to commit the offence of housebreaking, if you have any doubt at all that a person who stands in a door trying a number of keys in the lock in order to try and break into a house is waiting for an opportunity to break into the house if the keys will fit, then of course they are entitled to be acquitted. If you have no doubt about it whatever, it is equally your duty to convict. Will you consider your verdict and tell me what it is." In the view of this Court there was evidence for the jury and the jury were properly directed, and the jury found both the appellant and McFarlane guilty. There is no reason why this Court should interfere with that verdict. I should add that neither the appellant nor McFarlane gave evidence in the Court below.

There are two matters to which we think it right to refer. The first is the desirability of those responsible for settling indictments following the words of the statute creating the offence and not using words which go further than that when it is quite unnecessary so to do. The second is this. We think it most desirable to repeat the words which Humphreys, J., used at the conclusion of his judgment in GOODWIN'S CASE (*supra*). Sir Reginald Blaker has said already that he would bring to the notice of those instructing him that which has been said. That is not very helpful, I am afraid. Humphreys, J., with all his experience in these matters, expressed a decided view upon the use of this section when he gave the judgment of this Court on April 8, 1944. He said (30 Cr. App. R., at p. 28; [1944] K. B., at p. 524): "The Court would add, without making any general observation about this section, that they think that the police and those who have to deal with these matters, including Courts of justice, would do well to remember that, if the facts of a case are such that a man may equally be charged with two offences, one of which involves proof to the jury that he is of bad character, and the other requires no such proof, it is always desirable that the latter should be selected as the charge to be made against him. Once a jury know that a man is given to committing a particular

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class of crime, it must be extremely difficult for them to treat him in the same fair and impartial way as they would if they knew nothing whatever about him." That case was widely reported at the time, and those words of Humphreys, J., deserved the very careful consideration of the police and of prosecuting authorities. They were not said lightly; and they were meant to be followed. We regret that they were not followed in the circumstances of this case.

The appeal is dismissed.

Appeal dismissed.

Solicitors: Edward Davis, Nelson & Co., for appellant; Solicitor for Metropolitan Police, for the Crown.

BEFORE

MR. JUSTICE SINGLETON, MR. JUSTICE TUCKER AND MR. JUSTICE OLIVER.

1945.
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MOHAMED FARID.

Corroboration—Accomplice—Abortion—Witnesses Called to Prove Felonious Intent—Warning where Witnesses are not Accomplices in Actual Offence Charged.

Where witnesses are allowed to give evidence of illegal acts done by the prisoner other than the offence charged, *e.g.*, to prove felonious intent, and are in the position of accomplices with regard to those illegal acts, but are not accomplices in the offence charged, the Judge should give the jury the same warning as to the danger of acting on the uncorroborated evidence of those witnesses as is given in a case where the witnesses are accomplices with regard to actual offence charged.

Appeal against conviction.

The appellant was convicted at Birmingham Assizes on

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December 14, 1944, of manslaughter, and was sentenced by Wrottesley, J., to four years' penal servitude.

The case for the prosecution was that the appellant, who was a qualified doctor practising in Birmingham, had attempted to procure the abortion of a married woman named Mrs. Marjorie Hickinbottom and had so caused her death. Mrs. Hickinbottom had been introduced to the appellant by a man named Williams, who was called by the prosecution. The prosecution also called as witnesses to prove felonious intent two other women who, it was alleged, had visited the appellant for the same purpose and had been treated in a similar manner. The evidence, and the material portions of the summing-up, appear fully in the judgment.

J. F. Bourke, for the appellant:

The summing-up was unsatisfactory in several respects. In the first place, although the Judge directed the jury that the two other women who had visited the appellant were accomplices whose evidence required corroboration, he did not make it clear that Williams was in the same position. Secondly, the question of corroboration was in effect withdrawn from the jury, as it was never left to them to decide whether there was corroboration or not, the Judge having ruled on this question himself as a matter of law instead of leaving it to the jury to decide as an issue of fact. In any event, the Judge did not make it clear to the jury what were their functions in coming to a conclusion on the issue of corroboration. Further, the Judge told the jury that there was a great deal of corroboration of the evidence of the two women, whereas there was really no evidence capable of being regarded as corroboration of their evidence.

Richard O'Sullivan, K.C., and *A. J. Flint*, for the Crown:

The Judge gave the jury sufficient warning on the necessity of corroboration of the evidence of Williams, who was an accomplice in the crime charged. The other persons who were called with regard to other incidents to prove felonious intent were not quite in the same position. They were not accom-

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plices in the crime charged, and to hold that their evidence required corroboration to the same extent as the evidence of a person who was an accomplice in the crime charged would be to carry the law to an extent to which it has never hitherto been carried. In any event, even if the summing-up be held to be defective, this was a case where the evidence was overwhelming, and the Court is asked to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

TUCKER, J.: This is an appeal, by leave given by this Court, from a conviction in December, 1944, at Birmingham Assizes of the manslaughter of a woman called Marjorie Hickinbottom. The case for the prosecution was that the appellant, being an Egyptian by birth and a qualified doctor practising in Birmingham or the neighbourhood of Birmingham, had attempted to procure her abortion, and that as a result of that felonious act on his part she had died. The case was originally presented in an alternative way under which the jury were invited to say that in any event, even if he had not attempted to procure her abortion and even if his treatment of her had been *bona fide*, as he contended, none the less it had been so negligent, and so criminally negligent, as to make him guilty of manslaughter if her death was proved to have resulted therefrom. The learned Judge in summing up the case to the jury directed them to disregard that aspect of the case and told them to consider the evidence solely on the basis of the allegation that he had attempted criminally to procure her abortion, and as the result thereof she had died. That was the way in which the case was finally left to the jury, but in the course of the case at one time or another considerable evidence had apparently been directed to the alternative aspect of the matter.

I shall have later to refer in more detail to some of the facts of the case. It is sufficient for the moment to state it in brief outline. Marjorie Hickinbottom, aged twenty-seven, was a married woman who had been living apart from her husband for more than a year, and living with her mother at Malvern. The

case for the prosecution was that in April, 1944, she had become pregnant as the result of her association with a man called Williams, that she had been coming to Birmingham to get some treatment from another doctor in Birmingham, not the appellant, with a view of getting rid of her pregnancy, and that she had also visited a nurse for the same purpose. The prosecution suggested that, not having obtained the result that she desired, she and Williams were then minded to visit the appellant, that she was accordingly taken to his surgery, that she remained there for five days, and that eventually on or about May 13 she aborted at that surgery, and that she subsequently died as the result of septicæmia which supervened on June 30, 1944.

A great part of the evidence which was adduced by the prosecution consisted of evidence of persons who were or might have been regarded by the jury as accomplices. The principal witness for the prosecution undoubtedly was Williams, who on his own showing had taken Marjorie Hickinbottom to the appellant for the express purpose of her being aborted by him. He was beyond all doubt on his own statement an accomplice. But there were other witnesses who were accomplices in a sense. The prosecution had availed themselves of the right, which they undoubtedly had and as to which no objection was taken, of calling witnesses with regard to other similar occurrences, that is to say, with regard to two other women who, it was said, had visited the appellant for the same purpose and had been treated in a similar manner. That evidence was adduced and legitimately adduced for the purpose of negativing any possible defence by the appellant that his treatment was a legitimate and *bona fide* one. It was to show felonious intent. The two women concerned in those cases, a woman called Thompson and a woman called Whitaker, were undoubtedly on their own showing accomplices with regard to what they said had been done to them. They were not accomplices in the crime alleged against the appellant with regard to Marjorie Hickinbottom, but they were on their own showing accomplices with

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regard to criminal actions, as they said, by the appellant on them. There were other witnesses besides Whitaker and Thompson who were also accomplices with regard to those cases, Mrs. Brown and a woman called Southgate. Those witnesses in our view were witnesses whom the jury might well have thought to be accomplices; some of them undoubtedly were accomplices.

The ground of this appeal is that the learned Judge in his direction to the jury did not give them a sufficient or correct direction in law with regard to corroboration or a sufficient warning with regard to the danger of acting upon the evidence of accomplices. I turn now to the direction which he did give them on this point. He said: "Now there is another general point. You heard something about accomplices. It is true, as it must be obvious to you, that people like some of the witnesses are accomplices in having this unlawful thing done to them. That applies to Nancy Whitaker who went there and did what she ought not to have done, which is a crime. She went there and tried to prevent herself having a baby. We all know that that is against the law." Then there is something which goes a little wrong with the shorthand note, and the transcript continues, "the same applies to Gladys Thompson. Of course they are all accomplices. I shall tell you this and you will bear it in mind, that they are accomplices. It is one thing that you will bear in mind, that if there had been no corroboration of their story, if there had been no independent testimony affecting the prisoner or tending to connect him with the crime I should advise you not to convict him, but I do not give you that advice, because there is a great deal of corroboration. First and foremost I am dealing with Marjorie Hickinbottom, because the accused is charged with killing her—not the other girls. So far as that case is concerned, there is very ample corroboration of the dealings with this girl in the story upon which the prosecution found their case in that statement. It turns out on his own statement that he did treat this woman. She did go to his premises and he did do something to her. She did abort

there and he did send her away. All that is on his own statement. As regards the other two girls, Nancy Whitaker and Gladys Thompson, you have his own evidence, and it is true that they did go to him and he did treat them. You may not think that. You will have to form an opinion as to where the truth lies. It cannot be said that you have only the uncorroborated testimony of accomplices. You have the testimony of accomplices and they are very fully corroborated. It is for you and not for me, but there is material evidence which comes from the mouths of this man and those girls—it does not come from the mouths of this man and these women only—which tend to support in the strongest possible way that this man was dealing with them; indeed, you have his own evidence in the box, and that is, of course, strong corroboration." At a later stage, dealing with the man Williams, whom it will be observed the learned Judge had not referred to by name at that stage, the learned Judge said: "That is an important part of this case. What happened to Marjorie Hickinbottom between that Wednesday or Thursday when she entered the surgery, and the Monday evening when she left in the car to go home? The evidence as to that is really mainly the evidence of Eric Williams. I will read some of it. You have had portions of the evidence read to you, you have been reminded of it and it has been gone into carefully by counsel on one side and the other, and I need not read to you that evidence again, but I must remind you of the salient features of it. So far as Marjorie Hickinbottom is concerned, the evidence must be that of Eric Williams. The girl herself is dead so that we can only have the evidence of Eric Williams." Later he referred to Eric Williams again in these terms: "Members of the jury, do not let there be any doubt about this. If this man has told you the truth, you ought to acquit him. Of course, if what Williams said was true, then there is not a word of truth in what the accused says."

Mr. Bourke for the appellant complains of this summing-up in several respects. In the first place he says that the

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jury were never told that Williams was an accomplice whose evidence required corroboration, that their attention was directed only to Thompson and Whitaker as being accomplices, whereas the learned Judge later on in his summing-up emphasised the importance of the evidence of this man Williams as being the principal evidence in the case of Marjorie Hickinbottom. Secondly, Mr. Bourke contends that this direction amounted to withdrawing the question of corroboration from the jury, and that the learned Judge in effect took it upon himself to decide whether or not there was corroboration and did not leave it to the jury to decide whether there was corroboration which satisfied them. Thirdly, it is said that in any event there was not a sufficient direction to the jury as to their functions in dealing with corroboration, namely, that it is for the Judge to decide in any particular case whether there is evidence which is capable in law of amounting to corroboration and it is then the function of the jury to say with regard to the particular facts of a particular case whether that evidence satisfies them as being sufficient corroboration upon which they may safely act. Complaint is also made of the learned Judge's statement that there was a great deal of corroboration of the evidence of Whitaker and Thompson, whereas in fact it is said on behalf of the appellant that when the evidence is investigated, there was no evidence which was capable in law of amounting to corroboration. That is the criticism which is made of the summing-up

Now before dealing with that it is as well to refer to the authorities. The rule with regard to the proper direction which should be given in cases where the prosecution are relying upon the evidence of accomplices is well known. It is a matter which was originally one of practice and has now become to all intents and purposes a matter of law. As was stated by the Lord Chief Justice (Lord Hewart) in delivering the judgment of this Court in LEWIS (1937), 26 Cr. App. R. 110, at p. 113: "The rule is familiar. The practice of common law is for the Judge to warn the jury that it is unsafe to convict on the uncorroborated evidence of an accomplice

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and to advise them not to convict, though, at the same time, he may point out that it is within their legal province to convict if they think proper. Corroborative evidence must be evidence proceeding from a quarter independent of the accomplice and tending to implicate the accused and must corroborate the accomplice's evidence in a material particular." That is the general rule, and in LEWIS (*supra*), this Court held that that rule was one of universal application. That means this, that it is a warning which must be given to a jury not only in cases where there is no corroboration, but in cases where there is corroboration, and in cases where the Judge may consider that there is ample corroboration. That was laid down in LEWIS (*supra*), which was such a case. The Court in that case had to go on to consider whether or not it was one in which they ought to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and in that particular case they held that that was not a case in which the proviso should be applied, and they accordingly quashed the conviction because of the absence of this warning in a case where there was ample or, at any rate, considerable corroboration. There can, therefore, now be no question but that it is the duty of a Judge to give the jury such warning in clear language even in cases where there may be a considerable amount of corroboration.

It has been contended in this case on behalf of the Crown that Whitaker and Thompson were not accomplices in the crime alleged against the appellant, and that, therefore, strictly speaking, there was no need for such a warning to be given with regard to them. We do not agree with that submission. We think that in any case where a jury are being asked to act upon the evidence of an accomplice with a view ultimately to securing the conviction of a prisoner, they should be given this same warning as in cases where the witnesses are accomplices with regard to the actual offence charged against him. That being the position and it also being beyond question that it is not for a learned Judge to decide in any case, aye or no, whether there is corroboration,

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but that his function is to rule whether or not there is any evidence which is capable in law of amounting to corroboration and to leave it to the jury to take what course they think fit as to the extent to which they can act upon such evidence, we have come to the conclusion that the direction given by the learned Judge in this case does fall short of what the cases have decided is required in such a case as this, and that it does amount to a misdirection.

That being a misdirection with regard to a matter of law, the appellant would be entitled to succeed unless the prosecution can show that this is a case in which the Court ought to apply the proviso to section 4 (1) of the Criminal Appeal Act. The proviso to that section reads as follows: " Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." The proper way of applying the proviso or the proper interpretation to be put upon it has from time to time been considered by this Court, and it has quite recently been considered by the House of Lords in STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 30 Cr. App. R. 40; [1944] A. C. 315. The Lord Chancellor in his speech (at pages 47 and 321 of the respective reports) said this. The House were discussing in that case whether it was proper to introduce the word " inevitable "—and whether it was proper to consider whether or not the jury inevitably would have come to the same conclusion. He used these words: " A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence; but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict." Then the Lord Chancellor went on to say that the Court of Appeal had recently

in HADDY, 29 Cr. App. R. 182; [1944] K. B. 422, correctly interpreted section 4 (1) of the Criminal Appeal Act.

Now I turn to HADDY (*supra*) where the matter was dealt with at rather great length. Humphreys, J., in giving the judgment of the Court in that case (29 Cr. App. R., at p. 189; [1944] K. B., at p. 445), had occasion to quote what had been said by Channell, J., in COHEN AND BATEMAN (1909), 2 Cr. App. R. 197, at p. 207, and he quoted these words: " 'A mistake of the Judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words " any other ground ", so that the appeal should be allowed according as there is or is not a " miscarriage of justice ". There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the Judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso.' " Then Humphreys, J., continues as follows: " That statement of the law has stood for thirty-five years and, so far as we are aware, has never been the subject of adverse comment." That is the case which has received recently the approval of the House of Lords. Finally, towards the end of his judgment in that case the learned Judge says: " In this case we are satisfied that no reasonable jury properly directed throughout would, or

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could, have come to any other conclusion, and that no miscarriage of justice has actually occurred."

We think that it is our duty to apply the proviso, so interpreted, to the facts of this particular case. What are the facts of this case? This girl of twenty-seven lived with her parents at Malvern, some distance from Birmingham. She had a doctor of her own, a Doctor Davies. She had in April of 1944 consulted Dr. Davies with regard to her pregnancy. Her mother was not aware of her pregnancy and one can well believe that the girl might have been desirous of concealing it from her family doctor, but she had not concealed it from him; he knew of it and had made the necessary arrangements for her to be admitted to a nursing home towards the end of the year. Then she visits a doctor other than the appellant in Birmingham with a view undoubtedly of getting rid of this pregnancy and also she received douching from a nurse. Then on a day in May, which the evidence subsequently showed must have been May 10, she sets off from Malvern, her family home, to pay a visit of some days' duration away from her home. That was the evidence of her mother. She leaves home, she goes some miles to Birmingham; she does not go to see her family doctor, but she visits the appellant, Dr. Farid, who had a surgery in the outskirts of Birmingham. She is taken there by Williams, who has got her into this condition. She stays at this surgery from Wednesday, May, 10, until Monday, May 15. The surgery contained no facilities; there were no people at the surgery able to give attention to her. The doctor was away doing his work from time to time except during surgery hours and nobody in fact slept there with her during the five days she was there. There was nobody to attend to her except in so far as the doctor could attend to her and except in so far as Williams, when he visited her from time to time, could look after her. She stayed there in that surgery without any attention other than from those two people for those five days, according to the statement of the appellant, because, apart from him, there was no

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evidence to show the precise date. She in fact aborted on Saturday, May 13, at his surgery in his presence. While she was there, there was strong evidence identifying her as the person who had been seen by two of the neighbours to be pushing a mowing machine through thick grass on the doctor's lawn for several hours during the morning at a time when the appellant said that, if it had happened, he must have known. He denied that any such thing had happened or could have happened. Before she left she paid him, at least, the sum of £65. The prosecution suggested it was £75, but the appellant admits he received from her the sum of £65 for the treatment, whatever it was, which she received at his surgery. On Monday, May 15, she left. According to the evidence of the prosecution, she had a temperature at the time, or it was discovered very shortly afterwards, at any rate. She was taken by Williams in a motor car from the doctor's surgery to her home. She became very ill the next day, the 16th, and Dr. Davies, the family doctor, was called in. On the 17th she was removed to a nursing home. On June 18 septicæmia was diagnosed; her condition became very serious, and efforts were made to save her life by taking her to Queen Elizabeth Hospital in the hope that she might receive penicillin there. That proved unprocurable and she was taken home in a dying condition and in fact did die on June 30.

The evidence of Dr. Davies and Professor Webster was to the effect that the septicæmia was due to the after effects of abortion which had been brought about by external interference. The evidence was consistent with what was called packing, and that was the case for the prosecution. Furthermore, the medical evidence was to the effect that the condition of septicæmia was one which had arisen as the result of outside interference which had taken place within seven days from May 15.

Now the defence of the appellant was: "I admit that she came to my surgery; I admit that she stayed there from the Wednesday until the Monday, but she came merely as a case

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originally of threatened abortion, but later on her second or third visit she said she was losing a lot of blood. I pressed her and she admitted that she had interfered with herself and taken bark, and it was apparent then that it was a case not of threatened abortion, but of inevitable abortion." He said: "I thereupon treated her as a case of inevitable abortion which would require cleansing and douching, and in due course the abortion came off, and she was sent home when it was all done with."

Some parts of that evidence which I have outlined, we consider, contain matter which was not only capable of amounting to corroboration of the evidence of Williams, but was really overwhelming corroboration of his evidence. The three principal matters are these. The violent exercise being taken by this woman in pushing this lawn-mower for hours at this doctor's surgery at a time when he said she was ill in bed and receiving and requiring rest, the fact that she remained at this surgery without any facilities and/or treatment by other people looking after her, and, perhaps above all, that for such treatment, such as it was, in such a place, she paid £65 to a man whose normal fees were 2s., 6s. and 7s. 6d., who said his normal charges for a delivery were from £5 to £10 or guineas, and who, according to his evidence, had charged 35s. to another woman for somewhat similar treatment. Those are the matters which we think were not only capable of being corroboration, but were really of overwhelming force in strengthening the evidence of Williams.

Looking at the case as a whole, not only from the aspect of what was corroboration, but looking at the whole of the circumstances and the whole of the evidence, we have come to the opinion that this is a case in which the only reasonable and proper verdict would have been one of guilty, which is the verdict at which the jury in fact arrived.

Before parting with this case, there is one further observation to make. With regard to the evidence of Whitaker and Thompson, counsel for the appellant contended that a careful examination of the evidence showed that there was

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no corroboration at all of their evidence. We think that there were perhaps some matters, some small matters, which the jury might have considered as amounting to corroboration and which might have been left to them to consider. It is not necessary for us to express a concluded view about that, because in our view the learned Judge did in fact withdraw from the jury the necessity of considering whether or not there was corroboration of their evidence inasmuch as he told them that there was in fact ample corroboration. We think that there may perhaps have been matter which, on a proper direction, the jury might have thought right to consider as corroboration of evidence of those two witnesses. We think that it is, however, a matter which requires careful consideration by those responsible for prosecutions in cases where witnesses can be called to prove other offences by an accused person for the purpose of negativing accident or showing felonious intent, whether it is desirable to call that class of witness if there is in fact no corroboration at all of their evidence and the matters with regard to which they speak.

In the result we have come to the conclusion, after giving the matter most careful consideration (because this Court will not lightly apply the proviso) that this is a case beyond any doubt in which the proviso should be applied, and this appeal must be dismissed.

Appeal dismissed.

Solicitors: Hyman T. Isaacs, agent for Hatwill, Pritchett & Co., Birmingham, for the appellant.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE OLIVER AND MR. JUSTICE BIRKETT.

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GEORGE DARRY.

Sentence—Consecutive Sentences—Aggregate of Three Years' Imprisonment—Substitution of Penal Servitude—Penal Servitude Act, 1926 (16 & 17 *Geo.* 5, *c.* 58), *s.* 1 (1).*

Where a prisoner is convicted on several charges, though it is not illegal to impose consecutive sentences of imprisonment with hard labour for periods which in the aggregate amount to more than two years, it is not the practice to do so. The Court of Criminal Appeal may in such a case, where the convictions are for offences to which the Penal Servitude Act, 1926, applies and render the prisoner liable to terms of imprisonment amounting in the aggregate to not less than three years apply the provisions of the Act, and substitute for the sentences of imprisonment an appropriate sentence of penal servitude.

Appeal against sentence.

The appellant was convicted at Oxfordshire Quarter Sessions on April 2, 1945, on an indictment containing counts for housebreaking, attempted housebreaking and assaulting a police constable in the execution of his duty, and was sentenced by the Chairman to consecutive terms of eighteen, nine and nine months' imprisonment, in each case with hard labour.

* Section 1 (1) of the Penal Servitude Act, 1926, provides: "Where a person is convicted of two or more offences to which this Act applies in respect of which he is liable to be sentenced to terms of imprisonment amounting in the aggregate to a period of not less than three years, the Court may, instead of sentencing him to imprisonment, sentence him to penal servitude for any term not exceeding the aggregate period for which he might have been sentenced to imprisonment, so, however, that no sentence of penal servitude imposed under this section shall be for a term exceeding seven years."

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R. E. Seaton, for the appellant:

The sentences passed were improper or excessive in that they aggregated a period of imprisonment with hard labour for more than two years.

No counsel appeared for the Crown.

HUMPHREYS, J.: Without saying for a moment—indeed, our view is clearly to the contrary—that there is anything illegal in passing a sentence of more than two years' imprisonment with hard labour, it is not the practice to do so and has not been the practice for many years. In MORRISS, 19 Cr. App. R. 75; [1926] W. N. 53, the matter was very carefully considered, and it was laid down that what was done in that case was perfectly proper. In that case a sentence of two years' imprisonment with hard labour was followed by a term of imprisonment for twelve months without hard labour.

In the present case the Court might follow that course and order the two sentences of nine months' imprisonment to be served without hard labour, thus putting the case on all fours with MORRISS (*supra*). But owing, or partly owing, to the observations of the Court in that case, the Penal Servitude Act, 1926, was passed providing that in such a case as this the Court of Criminal Appeal may instead of sentences of imprisonment pass a sentence of penal servitude. We have the same power, and we propose to exercise it, and for this reason: In our opinion, the Chairman of Quarter Sessions was right when he took the view that this was a very bad case which ought to be followed by a very severe penalty. Not only had the appellant committed the offences named in the indictment, but the assault on the constable was a very bad one, and the appellant is a man with a shocking record. In 1934 he was sentenced to two years' imprisonment with hard labour for two offences with violence, nine other offences being taken into consideration. He was released in 1936 and it is said that he did no regular work until March, 1939. In that year he was sentenced to seven years' penal servitude for five cases of shop-breaking

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and office-breaking and for possessing explosives while engaged in that nefarious occupation. He was released from serving the sentence in June, 1944, with a remanet to serve and his story was that he had been earning £20 a week as a bookmaker, working one afternoon a week at a greyhound track. In our view, three years' detention is by no means excessive for a man of that class convicted of such offences. We shall in this case substitute a sentence of three years' penal servitude for the sentences passed at quarter sessions. Since the appellant has been given leave to appeal, the time during which he has been detained as an appellant will count towards his sentence.

Sentence varied.

Solicitors : Phillips & Phillips, for appellant.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE CASSELS AND MR. JUSTICE BIRKETT.

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4 *June.*

ALEXANDER TYLDESLEY GRIMSHAW.

Sentence—Borstal Detention—Substitution of Imprisonment.

Substitution of sentence of imprisonment for sentence of Borstal detention on a young offender.

Appeal against sentence.

The appellant pleaded guilty at Ipswich Quarter Sessions on April 5, 1945, to two charges of housebreaking and larceny, and asked for twelve similar cases to be taken into consideration. He was sentenced by the Recorder to three years' detention in a Borstal institution.

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Stuart Horner, for the appellant:

The Court is asked, in the appellant's own interest, to substitute a sentence of imprisonment, as he is a youth who is proved not to have responded to Borstal treatment.

No counsel appeared for the Crown.

HUMPHREYS, J.: The appellant's record, as given to the Recorder by a police officer, is this. He worked as an office boy and left in 1940 with a character described as unsatisfactory. Work was then found for him, which he left in September, 1941, again being described as a very unsatisfactory worker. In June, 1942, he was again found employment, but was discharged on August 10 with a character described as very unsatisfactory. On August 23, 1942, he was charged at Manchester City Petty Sessions with stealing a typewriter from an office, and he was bound over and placed on probation for twelve months. In November, 1942, he was called up for service in the Army. On December 6 he was charged at Gravesend Petty Sessions with stealing a ration book, for which he was fined 10s., one offence of larceny being taken into consideration. Four days later, having been in the Army only twenty-one days, he absented himself from his unit without leave. In January, 1944, he was sentenced at London Sessions to detention at a Borstal institution for not more than three years for being found on premises by night in December, 1943, with intent to commit a felony. Later in January he escaped from that institution and at once began committing a number of serious crimes in various parts of the country. In March, 1944, he was arrested at Newcastle-on-Tyne. In June 1944, he was sentenced at York Quarter Sessions to eighteen months' imprisonment for larceny and housebreaking, seven cases of housebreaking and sixteen cases of larceny being taken into consideration. The value of property stolen by the appellant from householders and shopkeepers was estimated to exceed £500.

After four months at Durham prison he was sent back by the Prison Commissioners in January, 1945, to the institution

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from which he had previously escaped, and on February 4 he escaped again, committing the crimes for which the sentence now in question was imposed.

The learned Recorder said to counsel for the accused man, who asked that he should not be sent back a third time to Borstal: "I apply my mind as best I can in dealing with all cases here." The accused man had given his reasons for not wishing to be sent back to Borstal. They may be very bad reasons and what he said about Borstal may be totally untrue. He had evidently formed the view that he did not like Borstal, that he was not doing any good there and was not being taught anything which was of use, and he thought that he was the subject of suspicion and dislike by his associates there. He made it quite clear that he would not stay there if he could escape, as he had done on two occasions already. The learned Recorder said: "If I gave this lad eighteen months" —which was obviously in his mind—"I should not appreciate my decision being treated, as apparently it might be, by the Prison Commissioners as they did in the case at the York City Sessions. The Recorder there was a member of the Bar of large experience and he gave this lad eighteen months' imprisonment, but he was taken out of prison and sent to Borstal." He then said that he was not disposed to send the accused man to prison for that reason.

The matter was then further considered by the learned Recorder, who no doubt gave much time and attention to this case, which, as Mr. Horner correctly says, was a difficult one and he came to the conclusion that he had, as this Court has, two separate and distinct classes of persons to consider. Courts in these days do their best in the interest of the accused person, and in passing sentence every Court has in mind the hope that the offender may be reformed and moulds its sentences accordingly, but Courts cannot altogether lose sight of another class of persons, namely, respectable householders whose premises are broken into and whose goods are stolen. We have no desire that this young appellant should be at large so as to prey on the public, as he obviously intends to

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do, and we know that there are in these days prisons for young offenders and facilities for the treatment of young offenders in prison. It is for the Home Office to decide to what prison he should go, for in our view it is not right that he should be sent back a third time to a Borstal institution. The application which he makes, although perhaps it is an unusual one, is quite clearly made and is supported by counsel, and it is that instead of being sent back to Borstal he should be sentenced to a term of imprisonment. We think the proper term of imprisonment is eighteen months, that being the term to which he was sentenced by the very experienced Recorder of York, and the term to which apparently he would have been sentenced by the Recorder of Ipswich, but for the fact that he came to the conclusion that it was useless to send him to prison because the Prison Commissioners would only take him out of prison and place him somewhere else.

The decision of this Court, therefore, is that the appeal against sentence be allowed to this extent, that the sentence of detention in a Borstal institution be quashed and a sentence of eighteen months' imprisonment substituted for it. As the appellant has been granted leave to appeal, the time during which he has been treated as an appellant will count towards his sentence.

Sentence varied.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE CROOM-JOHNSON AND MR. JUSTICE BIRKETT.

JAMES McGARRY.

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18 *June.*

Breach of Recognisance—Strict Proof of Facts Essential.

Where a prisoner is brought up for sentence on the ground that a recognisance previously entered into by him is alleged to have been broken, the Court should see that the facts are

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as strictly proved as if the allegation were that the prisoner had committed a crime.

Appeal against sentence.

The appellant pleaded guilty at Middlesex Sessions in May, 1944, to two charges of receiving stolen property, and was bound over under probation for two years. On May 5, 1945, he was brought before the same Court in respect of an alleged breach of his recognisance and was sentenced by the Chairman to twelve months' imprisonment.

When the appellant appeared before the Court in respect of the alleged breach, counsel for the prosecution mentioned to the Court the facts of the previous binding over, and a probation officer was then called, who deposed that in his opinion the appellant had not reported as regularly as he ought to have done. The probation officer himself had been absent owing to illness for three months during the period of the recognisance, and when he returned to work he lost touch with the appellant. The appellant put forward the explanation that he had been in bad health and had not intentionally broken any term of the recognisance.

Paul Wrightson, for the appellant.
H. P. Stirling, for the Crown.

HUMPHREYS, J.: When it came to the question of what was to be done with the prisoner in the dock, nobody produced the recognisance, if it was in writing. We do not even know whether it was in writing because we have no official knowledge whether at Middlesex Quarter Sessions recognisances are taken in writing or not. Some Courts do, and some do not take recognisances orally without reducing them into writing, both methods being permissible. If the original recognisance was reduced into writing, it ought to have been produced to the Court which had to deal with the appellant in respect of the alleged breach; if not, the Court should have been informed by some proper means of the exact terms of the recognisance into which he had entered, for the only justification for bringing

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him up on that occasion was that he had broken a term of the recognisance.

That being the state of affairs, in our view the sentence of twelve months' imprisonment was bad from the start, because the Court had no material at all on which to form the opinion that he had broken any term of the recognisance which was not before the Court. Without saying that the appellant had behaved well, we think it due to him to say that the explanation which he put forward and the information which was given about him make it look as if this may be a case where the appellant was in such a bad state of health mentally and physically that he was not deliberately breaking any terms of the recognisance, even if it be assumed that one of the terms of the recognisance was that the appellant should report to the probation officer. It is quite clear that no one suggested that the appellant had committed another crime of any sort, which would be a very good ground for saying that he should be sent to prison in respect of the old crime, or that he was leading an improper life in any way. The whole matter was very irregular and very unsatisfactory, and we would suggest to Chairmen of Quarter Sessions and others who have to deal with such matters that they should see that, when a prisoner is brought up for sentence because a recognisance previously entered into is alleged to have been broken, those facts are proved just as they would be proved if the allegation were that the prisoner had committed a crime.

We are not satisfied that the Court of Quarter Sessions had jurisdiction to find, as it did, that the appellant had broken the terms of a recognisance into which he had entered, and it had therefore no jurisdiction to pass the sentence of twelve months' imprisonment, which sentence is accordingly quashed.

Sentence quashed.

BEFORE

MR. JUSTICE WROTTESLEY, MR. JUSTICE CROOM-JOHNSON AND MR. JUSTICE BIRKETT.

1945
9 *July.*

RICHARD HAMID.

Share Pushing—Business of Dealing in Securities—No Principal's Licence—Invitation to Subscribe to Capital of Company not yet in Existence—Whether Offence Committed—Prevention of Fraud (Investments) Act, 1939 (2 & 3 Geo. 6, c. 16) ss. 1, 26.

Section 1 of the Prevention of Fraud (Investments) Act, 1939, which prohibits carrying on or purporting to carry on the business of dealing in securities except under the authority of a licence, is not confined in its operation to carrying or purporting to carry on business relating to existing companies or existing securities only.

Application for extension of time for leave to appeal against conviction and sentence.

The applicant was convicted at the County of London Sessions on February 22, 1945, of carrying on the business of dealing in securities without having obtained a principal's licence, contrary to section 1 (a) of the Prevention of Fraud (Investments) Act, 1939. On April 11, 1945, he was fined £300 and ordered to pay the costs of the prosecution.

The conviction of the applicant rested on four different transactions. Three of them were invitations to the person to whom the letter in question was addressed to subscribe money towards the share capital of companies which were not in existence, but were to be formed.

H. Lester, for the applicant:

The statute, being one relating to criminal matters, must be construed strictly and should be confined in its operation to the carrying on of business relating to existing companies only.

No counsel appeared for the Crown.

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WROTTESLEY, J.: In form this is an application to extend the time for leave to appeal, but the Court thought it right to listen to the merits of the points of law raised by the applicant's counsel. The offence charged was that the applicant had infringed section 1 of the Prevention of Fraud (Investments) Act, 1939. Part of the title of the Act is "An Act for regulating the business of dealing in securities". The scheme of the Act, which it is desirable in this connection to consider, is that after the appointed day—and there is no question that the transactions here were after the appointed day—a person shall not "carry on or purport to carry on the business of dealing in securities except under the authority of a principal's licence", and it is not in dispute that the applicant had not got a licence.

The point of law adumbrated in this case by counsel for the applicant was that, since in the first three transactions the invitation related to a company not yet formed, they were transactions not covered by the Act under which the indictment was framed, and of which I have read the first section, for this reason, that in certain definitions to be found in section 26 there is language which shows that the restrictions imposed and the offences created by that Act were confined to companies already in existence. Of course, if the Act had been so limited, it would have been somewhat remarkable, because the obvious scope and intention of the Act is to protect the public by ensuring that persons who invite the public to part with its money for the purpose of dealing in securities, to use the language of the Act, should be persons of substance; and it is just as desirable, and conceivably even more desirable, that persons of substance only should be doing such business where the transaction relates to a company not even registered.

But counsel for the applicant pointed out that this is a criminal matter, and if the language of the Act should lead to such a technical conclusion, the Court would be bound by it, so we must consider the language. The language in question is this. The charge is "carrying on the business of dealing in

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securities", and "dealing in securities" is defined in the definition section of the Act as "doing any of the following things (whether as a principal or as an agent), that is to say, making or offering to make with any person, or inducing or attempting to induce any person to enter into or to offer to enter into— (a) any agreement for, or with a view to acquiring, disposing of, subscribing for or underwriting securities", etc. That language sufficiently indicates the scope of the Act. It will be observed that the word "securities" also is defined as "shares or debentures, or rights or interests (described whether as units or otherwise) in any shares or debentures". Finally the word "shares" itself is defined as meaning "shares in the share capital of a corporation or stock of a corporation". From that counsel asks us to conclude that this Act is confined to dealing in shares of an existing corporation. It would be surprising, as I have said, having regard to the obvious mischief to be cured by this Act, if there had been any such limitation to be read into it, but when we look at the definition I have read of "dealing in securities" we see that it is extended if necessary to include "making or offering to make with any person, or inducing or attempting to induce any person to enter into or offer to enter into (a) any agreement for," *inter alia*, "subscribing for or underwriting securities". It is clear to us from this that no intention was in the mind of the draughtsman of the Act or the Legislature to confine the operation of the Act to carrying on business relating to existing companies or existing securities only. Therefore that point must fail.

Apart from that, we have asked for and have not received any reason to support the suggestion that this Act is to be read in the confined sense argued for on behalf of the applicant here. That being so, we feel that there are no matters which justify the Court in extending the time for appeal, and the application to extend the time is, therefore, not granted.

There is another application, that in the peculiar circumstances of this case the sentence was excessive. We all agree

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that it is obvious from the shorthand notes of the proceedings that the way in which this offence came to be committed was that the applicant rather unwisely decided to challenge the authority of the Board of Trade and to go on, although he must have known that what he was doing was contrary to a most important law, passed for the protection of the public. But we do observe that there was nothing clandestine about it, and on that ground we think that the justice of the case would be met by reducing the fine from £300 to £100. We do not interfere with that part of the sentence which ordered the applicant to pay the costs of the prosecution.

Sentence reduced.

Solicitors: Bein, Lawrence & Co., for applicant.

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